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IN THE

Supreme Court of the United States

ROBERT B. McCLOY, JR.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a dissented opinion, the Tenth Circuit held that Dr. Robert B. McCloy, Jr. ("McCloy"), a horse owner-spectator, is strictly liable under the Horse Protection Act ("HPA") for the unauthorized improper actions taken by a horse trainer. This holding directly conflicts with every circuit court that has considered this issue, specifically, the Sixth, Eighth, Ninth, Eleventh, and the District of Columbia Circuits. The underlying issue considered by the Tenth Circuit was whether the United States Department of Agriculture ("USDA") erred in finding that McCloy violated 15 U.S.C. § 1824(2)(D) of the HPA when the horse trainer flatly disobeyed McCloy's instructions and used an unauthorized training method of "soring" before entering McCloy's horse in a show.

McCloy contends he did not violate the HPA because he: (1) took genuine meaningful steps to prevent his horse from being sore by making unannounced visits to the trainer's stables and specifically instructing the trainer not to sore his horse; (2) had no knowledge that the horse had been entered in the show by the trainer; (3) had no knowledge that his horse was sore or had ever been sored; and (4) did not participate or have any experience in training horses. The Tenth Circuit, however, held that if a horse is found to be sore, 15 U.S.C. § 1824(2)(D) imposes strict liability against horse owners, and horse owners are liable for violating the HPA merely by allowing horses to be entered in shows, regardless of whether the owners are implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring. The Tenth Circuit's decision conflicts not only with the other circuit courts that have considered this issue, but also with the USDA's own published Operating Plan.

Two questions are presented:

1) Does 15 U.S.C. § 1824(2)(D) of the HPA impose strict liability against a horse owner for the unauthorized acts of a trainer when the horse owner has taken genuine meaningful steps to prevent soring?

2) Did the Tenth Circuit unfairly violate individual rights by giving judicial deference to an unreasonable statutory interpretation of the HPA that contradicts the USDA's own published interpretation of the HPA and gives the USDA enforcement powers that were not intended by our legislature?

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *McCloy v. United States Department of Agriculture*, 351 F.3d 447 (10th Cir. 2003). *See* Appendix A. The Judicial Officer's Decision and Order was filed on March 22, 2002, and the Administrative Law Judge's Decision and Order was filed on August 10, 2001. *See* Appendices B and C.

STATEMENT OF JURISDICTION

The Tenth Circuit's opinion was issued on December 2, 2003. McCloy timely filed a Motion for Rehearing with Suggestion of Rehearing En Banc on January 12, 2004, which was denied on February 3, 2004. *See* Appendix D. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The HPA prohibits:

> [t]he (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore; (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore; (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore; and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

STATEMENT OF FACTS

1. McCloy is a full-time physician in Norman, Oklahoma. He is an upstanding professional who has served his community for many years. Decision and Order filed August 10, 2001, signed by Dorothea A. Baker, Administrative Law Judge (ALJ's Opinion), p. 3. He bought his first Tennessee Walking Horse (TWH) in 1964, and has been actively involved in owning TWHs and Quarter Horses since 1993. Transcript of Hearing Held before the Honorable Dorothea A. Baker, Administrative Law Judge, on August 22, 2000, in Oklahoma City, Oklahoma, filed September 11, 2001 (Transcript), p. 149.

Other than this case, McCloy has never been charged with violating the HPA, and he has always instructed trainers not to abuse or sore his horses. ALJ's Opinion, p. 5. In 1995, McCloy purchased a TWH named Ebony's Threat's Ms. Professor ("Missy"). Transcript, pp. 20-22. In 1997, McCloy placed Missy in training in Lewisburg, Tennessee at the stables of Ronal Young ("Young"), a professional horse trainer. Transcript, pp. 23-24. When Missy was moved to Young's stable, McCloy instructed Young to refrain from soring or otherwise abusing Missy, which Young agreed to and has acknowledged in the form of a sworn statement. Transcript, p. 158, RX B. Missy was shown by trainers a total of about 25 times and was always in compliance with the HPA. Transcript, pp. 151, 162.

During the time Missy was boarded at Young's stable, McCloy made unannounced visits to check on Missy and never saw any signs of abuse; she was always in good health and her gait was always free-flowing and natural. Transcript, pp. 152-53. McCloy always made it clear to trainers that they

were required to comply with the HPA. Transcript, p. 150. He took every precaution he believed was necessary to prevent abuse or violations of the HPA. Transcript, pp. 151-52.

The Celebration is the biggest show of the year for TWHs. In 1998, Missy was entered by Young in a class for trainers' wives in which Young's wife, Judy, planned to show. Transcript, pp. 152-53. McCloy did not know Missy was entered in the show; he was there to observe his other two horses. Transcript, p. 152. The first time he became aware that Missy was entered in the show was when Judy approached him in the horse show seating area and informed him that Missy had been disqualified. Transcript, p. 152. Upon receiving this information, McCloy immediately attempted to locate Young and Missy but discovered that they had already left the show grounds. Transcript, p. 153.

When McCloy confronted Young the next morning, Young assured him that what happened did not involve McCloy; Young explained that the "ticket" was issued only to Young. Transcript, pp. 153-54, 195. Young also informed McCloy that he was shutting down his business, which he ultimately accomplished within six months, and he asked McCloy to please bear with him until he was able to do so. Transcript, p. 154. McCloy began making plans to move Missy, and Young did not enter Missy in any more shows, except for two shows where McCloy was personally present to examine Missy before both shows. Transcript, pp. 174-75.

2. The USDA never charged Young with violating the HPA. Transcript, p. 147. McCloy first learned that he was being charged with a violation after he was interviewed by a

USDA investigator in Norman, Oklahoma in November, 1998. Transcript, p. 154. At the administrative hearing, the ALJ found "that [McCloy] was a truthful, credible witness. His demeanor displayed honesty and integrity. His testimony has been awarded full credence and credibility." ALJ's Opinion, p. 8. In this regard, McCloy was found to have taken genuine meaningful steps to prevent Missy from being sored. Nevertheless, the USDA imposed a strict liability standard on McCloy and ruled that he violated the HPA.[1]

3. McCloy filed his Petition for Review on July 19, 2002. The Tenth's Circuit's decision was entered on December 2, 2003. McCloy timely filed a Petition for Rehearing with Suggestion of Rehearing *En Banc* on January 12, 2004. On February 3, 2004, the Tenth Circuit denied the Petition for Rehearing with Suggestion of Rehearing *En Banc*. McCloy timely filed this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Whether the language of the HPA imposes strict liability on horse owners and whether Congress intended such an interpretation is an important question on which circuit courts are split. Because of the circuit split, this Court's guidance is essential. The Tenth Circuit's holding of strict liability against horse owners for the acts of horse trainers conflicts in various respects with the holdings of five other circuits and blatantly ignores the USDA's presentation of its case and its own Operating Plan.

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1. The ALJ and the JO found conflicting reasons why McCloy violated the HPA, and the JO added a period of suspension to McCloy's fine-only penalty.

All other circuits considering this issue have focused on the meaning of the word "allow" and analyzed whether the horse owner took sufficient steps to prevent soring. When the Tenth Circuit rendered its decision, it had the benefit of these prior opinions, but it disregarded them by imposing a strict liability standard that renders liability on a horse owner regardless of what actions an owner takes to prevent soring. Moreover, in 1999, shortly after the charges were brought against McCloy, the USDA implemented and adopted an Operating Plan, which specifically states that 15 U.S.C. § 1824(2)(D) provides an exemption from liability under the HPA for horse owners that meet certain requirements. Despite the inconsistency in how the USDA enforces the HPA, the Tenth Circuit gave judicial deference to a statutory interpretation not contemplated, argued or ever presented by the USDA in order to impose strict liability against McCloy. Review by this Court is warranted to determine whether judicial deference should be afforded to the USDA based upon a statutory interpretation that is contrary to the USDA's own published interpretation of the HPA.

Review of this case is further essential to prevent the Tenth Circuit from rewriting the HPA through a judicial interpretation that is beyond the intent of our legislature, presumably, in an effort to provide the USDA with enforcement powers at the expense of individual rights. Other circuit court opinions and the USDA's own Operating Plan recognize that the HPA gives a limited liability exemption to horse owners that take meaningful steps to prevent soring. The Tenth Circuit's opinion has left horse owners in an awkward and vulnerable position. Compliance with the HPA under the Tenth Circuit's interpretation has become virtually

impossible. A decision by this Court will bring the clarity and direction needed for USDA enforcement and horse owner compliance under the HPA.

A. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE LIABILITY STANDARD IMPOSED BY 15 U.S.C. § 1824(2)(D) OF THE HPA.

The Tenth Circuit affirmed the USDA's finding of liability by holding that 15 U.S.C. § 1824(2) can reasonably be interpreted to impose strict liability on horse owners if their horse is found to be sore. *See McCloy v. USDA*, 351 F.3d 447, 452-53 (10th Cir. 2003). According the Tenth Circuit, the word "allowing" in clause (D) of 15 U.S.C. § 1824(2) only requires the entry of a horse by an owner, and a horse's being sore is not a component of what the owner must "allow" to violate the HPA. *Id.* at 451-42.

The Sixth, Eighth, Ninth, Eleventh, and the District of Columbia Circuits have all addressed horse owner liability under 15 U.S.C. § 1824(2)(D). Contrary to the Tenth Circuit, however, none of these circuit courts has ever found that the HPA imposes strict liability on horse owners. Instead, these Circuits have all focused on the meaning of the word "allow" and what steps are required to be taken by an owner to avoid liability under the HPA.

In *Baird v. United States Department of Agriculture*, 39 F.3d 131 (6th Cir. 1994), the Sixth Circuit set out a test used in determining whether an owner "allowed" a sore horse to be entered in a horse show in violation of the HPA.

It determined that the USDA must make out a prima facie case as to a violation of the HPA, and the USDA establishes a prima facie case by proving: (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. *Id.* at 137. If the USDA establishes a prima facie case, the owner may then offer evidence that affirmative steps were taken to prevent soring. *Id.* If the owner is able to present such evidence and that evidence is "justifiably credited," the burden shifts back to the USDA so that it may prove that such admonitions were merely a pretext or self-serving ruse. *Id.* The *Baird* court noted that an owner could violate the HPA by explicitly condoning or authorizing the conduct or act in question, by "looking the other way," or by "burying one's head in the sand." *Id.* at 137.

Cases decided in the Eleventh and Eighth Circuits likewise do not support a strict liability analysis. In *Burton v. United States Department of Agriculture*, 683 F.2d 280, 283 (8th Cir. 1982), the Court held:

> [A]n owner cannot be held to have "allowed" a "sore" horse to be shown when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a "sore" condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a "sore" horse. All of these factors taken together are sufficient to excuse an owner from liability.

In *Lewis v. Secretary of Agriculture*, 73 F.3d 312 (11th Cir. 1996), the Eleventh Circuit was persuaded, "with a

slight caveat," by the Eighth Circuit's opinion in *Burton*. The *Lewis* Court followed the *Burton* test because it "fits neatly into traditional judicial analysis. It carries out the purposes of the HPA while providing some protection for horse owners who are cooperating in seeking compliance." *Lewis*, 73 F.3d at 316. The caveat placed on the *Burton* test relates to the third element, which the *Lewis* Court found requires that compliance with that element be meaningful rather than ritualistic. *Id.*

Although *Burton* and *Lewis* refer to a Designated Qualified Person (DQP) examining and approving a horse before entering the ring as one of its elements, this is not an exclusive test and merely related to facts that were present in those cases. As is explained in *Baird*,

> [W]e do not read the three-pronged analysis set forth in *Burton* as constituting a hard-and-fast test to determine whether an owner has violated the [HPA]. Instead, *Burton*, in our view, provides guidance for courts reviewing cases like the one at bar, and it does so by enumerating a set of relevant factors to consider, a set that is not necessarily exhaustive.

Baird, supra, 39 F.3d at 136-37.

In *Stamper v. Secretary of Agriculture*, 722 F.2d 1483 (9th Cir. 1984), the Ninth Circuit did not pass on the issue of whether the owners "allowed" the entry of their horse because there was no evidence that the owners "instructed their trainers not to sore their horses." *Id.* at 1489. It found this to be a very important factor distinguishing the owner's case from *Burton*. *Id.* Because of the Ninth Circuit's recognition

that an owner's instruction to a trainer is of paramount importance, it clearly did not utilize a strict liability analysis. *See Id.* at 1488-89.

Finally, even in the opinion most relied upon by the USDA, *Crawford v. United States Department of Agriculture*, 50 F.3d 46, 51 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 824, 116 S. Ct. 88, 133 L. Ed. 2d 45 (1995), the D.C. Circuit held that it would be reasonable to conclude that an owner did not violate the HPA if the trainer flatly disobeyed the owner's instruction, and the trainer was terminated by the owner, or that someone else had sored the horse. Thus, although the USDA cites *Crawford* as support for its strict liability standard, the D.C. Circuit never adopted such a standard for horse owner liability under the HPA.

As pointed out in the dissent, the Tenth Circuit's majority opinion ignores the plain language of the HPA, does not consider the statutory language as a whole, and rejects an interpretation that would require the USDA to prove that the owner is somehow responsible for soring by authorizing, condoning, or remaining deliberately ignorant about it. *See McCloy*, *supra*, 351 F.3d at 453-54.

B. REVIEW IS NECESSARY TO RESOLVE WHETHER AN AGENCY IS ENTITLED TO JUDICIAL DEFERENCE FOR A STATUTORY INTERPRETATION THAT IS CONTRARY TO THAT AGENCY'S SUBSEQUENTLY ADOPTED AND PUBLISHED OPERATING PLAN.

The USDA's own published Operating Plan conflicts with the Tenth Circuit's opinion. More specifically, after McCloy was charged with violating the HPA, Section VII, Subsection D of the USDA's Horse Protection Program Operating Plan for the 1999 Horse Show Season ("Operating Plan") was adopted. In relevant part, it provides:

> D. *Limited Exemption from Liability.* ***Section 1824(2)(D) of the Act contains a limited exemption from liability for a horse owner who demonstrates that he or she did not "allow" the horse to be entered or exhibited in a show while sore.*** This exemption applies only to those owners who themselves did not participate in the entry, exhibition, sale, or auction of a sore horse. An owner, to avoid liability for "allowing" his or her horse to be shown or exhibited, entered, sold, auctioned, or offered for sale while sore, must first present credible evidence that he or she did not participate in the entry, transportation, preparation for showing, exhibiting, sale, or auction. Second, the owner must show that he or she took affirmative steps: (1) to select a trainer whom the owner would not reasonably expect would sore the horse; (2) to ensure that the trainer understands what soring is as defined in the HPA, understands that the owner does not want the trainer to sore the horse and understands the consequences of

> soring the horse; and (3) to periodically check the condition of the horse.

USDA's Horse Protection Program Operating Plan, pp. 20- 21 (emphasis added).

Thus, the Operating Plan specifically interprets Section 1824(2)(D) to provide an exemption under the HPA for horse owners that take affirmative steps to prevent soring, regardless of whether their efforts are successful. This is in stark contrast to the "strict liability" standard adopted by the Tenth Circuit. Under the USDA's Operating Plan, "allow" clearly does not encompass strict liability principles.

An agency's interpretation of a specific statutory provision is entitled to judicial deference and will be upheld only "***if it is reasonable and consistently applied***." *Universal Construction Company, Inc. v. Occupational Safety and Health Review Commission*, 182 F.3d 726, 728 (10th Cir. 1999). The Operating Plan in and of itself demonstrates that the USDA has not consistently applied "strict liability" to horse owners under the HPA. The USDA, therefore, should not be entitled to judicial deference. Review by this Court is necessary to determine whether judicial deference should be afforded to agency interpretations that conflict with their published enforcement guidelines.

Furthermore, the Tenth Circuit's rationale set forth in the majority opinion is unreasonable, confusing and difficult to follow. As noted in the dissenting opinion, the majority overanalyzes the HPA and ignores its plain language. *See McCloy*, 351 F.3d at 453-54. The majority focuses on the words "*respecting a horse which is sore*" in clause (D). It then opines that because clauses (A), (B) and (C) reference

a "horse which is sore," the "sore" language in clause (D) would become sloppy surplusage if it did not mean that what the owner must "allow" is merely the showing or exhibiting of a horse to violate the HPA if the horse turns out to be sore. *Id.* at 451.

Simply stated, it appears that the majority makes a distinction between "allowing an entry of a horse which is sore" and "allowing an entry respecting a horse which is sore." This, however, is a distinction without a difference. Both interpretations require that an owner "allow" the entry of a sore horse to violate the HPA.

Through an unreasonable and misconstrued interpretation, the majority holds that the latter phrase can reasonably be read to say "*that what the owner must 'allow' is merely the showing or exhibiting of the horse, but that there is no violation unless the showing or exhibiting was with respect to (i.e., involved) a sore horse.*" *Id.* at 451-52. By taking this position, the majority rewrites the statute and separates two very critical phrases in the above-quoted sentence. "*Respecting a horse which is sore*" is removed from the first half of the quoted sentence, and "*the owner allows*" is removed from the second half of the sentence. There is no justification for the majority to separate these phrases because both phrases are intertwined and an integral part of the same clause – clause (D) of Section 1824(2). With its opinion, the Tenth Circuit effectively rewrites the HPA at the expense of individual rights to give the USDA enforcement powers that were not contemplated by our legislature or by the USDA's own Operating Plan.

CONCLUSION

Based upon the foregoing reasons, McCloy prays that the United States Supreme Court grant his Petition For a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED DECEMBER 2, 2003

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 02-9543

ROBERT B. McCLOY, JR.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE
(D.C. No. HPA 99-0020)

Before KELLY, HENRY, and HARTZ, Circuit Judges.

HARTZ, Circuit Judge.

Petitioner Robert B. McCloy, Jr., appeals from an order of the Secretary of Agriculture (the Secretary) finding him liable under the Horse Protection Act (HPA), 15 U.S.C. §§ 1821-31, for allowing a sore horse to be entered in a horse show. We have jurisdiction under 15 U.S.C. § 1825(b)(2), and we affirm.

Appendix A

BACKGROUND

Congress enacted the HPA in 1970 to combat the "cruel and inhumane" practice of soring Tennessee Walking Horses in order to improve their performance at horse shows. 15 U.S.C. § 1822. "If the front feet of the horse were deliberately made sore, the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly the desired gait." H.R. Rep. No. 91-1597 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. "[S]oring is usually done by applying a blistering agent, such as oil of mustard, to the pastern area of the horse's leg and by wrapping this area with chains or metal rollers." *Id.*

The HPA prohibits:

> The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2). Those found in violation of the HPA are subject to civil penalties of up to $2,200 for each violation and suspension from showing horses for a period of at least one year. *See* 15 U.S.C. § 1825(b)(1); 7 C.F.R.

§ 3.91(b)(2)(vii) (adjusting fine upward to $2,200 in accordance with Federal Civil Penalties Inflation Adjustment Act of 1990); 15 U.S.C. § 1825(c). Knowing violations are subject to criminal penalties. 15 U.S.C. § 1825(a). The HPA authorizes the Secretary "to issue such rules and regulations as he deems necessary to carry out the provisions of [the HPA]." 15 U.S.C. § 1828.

Dr. McCloy purchased Ebony's Threat's Ms. Professor (Missy), a Tennessee Walking Horse, in 1995 and placed her with trainer Ronal Young in 1997. According to Dr. McCloy, he instructed Young that "[t]here was no need to sore the horse," Tr. 152, and he made unannounced visits to Young's stables to insure that Missy was not sored, Tr. 170, although Dr. McCloy also admits in his affidavit that he gave Young "no verbal or written instructions concerning the training of [Missy]. Mr. Young was given complete custody in training the horse." Complainant's Exh. 4. Despite the apparently inconsistent testimony, the Judicial Officer (JO) for the United States Department of Agriculture (USDA) found that Dr. McCloy had given Young a genuine instruction not to sore Missy. Aplt. App. I at 58.

Missy was entered in the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on September 4, 1998. Officials from the horse show inspected Missy and disqualified her from participating on the ground that she was sore. Two veterinarians from the Animal and Plant Health Inspection Service (APHIS), an agency of the USDA, then examined Missy and determined that she was indeed sore. Dr. McCloy learned of the disqualification while watching the show in the stands and testified later that he was not aware that Missy would be shown.

Appendix A

The APHIS filed a complaint against Dr. McCloy in May of 1999. An Administrative Law Judge (ALJ) determined on August 10, 2001, that Dr. McCloy had violated the HPA by allowing entry of a sore horse and assessed a fine of $2,200. On appeal to the JO, the APHIS argued that Dr. McCloy should also be disqualified from showing horses for a period of time; and Dr. McCloy argued that the ALJ had erred in concluding that he had violated the HPA. On March 22, 2002, the JO filed a 73-page opinion affirming the finding that Dr. McCloy violated the HPA, affirming imposition of the $2,200 fine, and additionally imposing a one-year disqualification period.

The JO determined that the "evidence establishes that [Dr. McCloy] did not know that Ronal Young entered Missy . . . until he was informed . . . that Missy had been 'turned down,'" and the JO also noted that there is "no evidence that [Dr. McCloy] objected to his trainers entering Missy in horse shows or horse exhibitions, and, specifically, the record contains no evidence that [Dr. McCloy] objected to Ronal Young's entering Missy in the 60th Annual Tennessee Walking Horse National Celebration." Aplt. App. I at 28-29. Adopting the USDA's position on what constitutes "allowing" a sore horse to be entered, the JO further found that Dr. McCloy was a "guarantor that Missy would not be sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration . . . [and] . . . [Dr. McCloy] breached his guarantee as a horse owner that Ronal Young . . . would not enter Missy in the [show] . . . while she was sore." *Id.* at 29-30. The Secretary's position, as characterized by the JO, is that "a horse owner who allows a person to enter the owner's horse in a horse show or horse

exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition." *Id.* at 28 (citing *In re Carl Edwards & Sons Stables*, 56 Agric. Dec. 529, 589-90 (1997); *In re Gary R. Edwards*, 55 Agric. Dec. 892, 979 (1996); *In re John T. Gray*, 55 Agric. Dec. 853, 888 (1996)). A subsequent motion for reconsideration was denied, and Dr. McCloy filed a timely petition for review with this court.

DISCUSSION

Our review of the JO's decision is limited to determining "whether the proper legal standards were employed and substantial evidence supports the decision." *Gray v. USDA*, 39 F.3d 670, 675 (6th Cir. 1994) (internal quotation marks omitted); *see also* 15 U.S.C. § 1825(b)(2) ("[F]indings of the Secretary shall be set aside if found to be unsupported by substantial evidence."). Dr. McCloy challenges both the legal standard employed by the JO and the sufficiency of the evidence to support the JO's findings. We begin with the challenge to the legal standard.

Section 1824(2) of the HPA prohibits:

> The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any

> activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

Clause (D) is the clause that governs the liability of owners. It states that the owner is liable for "allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore." The decisive question is *what* must the owner allow if he is to be liable. The USDA reading of the statute is that the owner need only allow the entry of the horse in a show, the sale of the horse, etc. The fact of the horse's being sore is not a component of what the owner must allow. The owner need have no knowledge of the horse's being sore, nor need the owner bear any fault with respect to the soring. If, for example, the owner allows a horse to be entered in an exhibition, then the owner is liable if it turns out that the horse was sore. We will refer to this interpretation as the "simply-allowing" interpretation.

The alternative reading of the statute is that the owner must allow not just the entry of a horse, but the entry of a *sore* horse. If that is the proper reading of the statute, there remains the issue of what it means to "allow" the entry of a sore horse. One could say that the owner "allows" the entry of a sore horse only if the owner *knows* the horse is sore. Or one might say that an owner can "allow" such entry by failing to take reasonable steps to prevent the horse from being entered when sore. Or one might interpret "allow" to require some other degree of responsibility by the owner. All such interpretations, however, would require some element of owner responsibility for the soring itself. We will refer to these interpretations as "allowing-plus"

interpretations. Dr. McCloy argues for an allowing-plus interpretation. He contends that USDA's contrary construction of the statute is simply wrong.

When an agency charged with the administration of a statute consistently applies a reasonable construction of the statute in the course of formal adjudication, we ordinarily defer to that construction. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002) (consistent interpretation of § 10(b) by SEC in formal adjudication is entitled to deference if reasonable); *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001); Crawford *v. USDA*, 50 F.3d 46, 50-51 (D.C. Cir. 1995) (deferring to USDA interpretation of § 1824(2)). There can be no dispute that the USDA is charged with administering the HPA, and that it has consistently interpreted § 1824(2)(D) in the context of formal adjudication. But there is a circuit split regarding whether the USDA's construction of the HPA with respect to owner liability is reasonable. *Compare Crawford v. USDA*, 50 F.3d 46, 50-51 (D.C. Cir. 1995) (deferring to USDA interpretation of § 1824(2)) *with Baird v. USDA*. 39 F.3d 131, 137 n.10 (6th Cir. 1994) (USDA interpretation does not "fall[] within the range of permissible interpretations"). In our view, the USDA interpretation is a reasonable one. That interpretation is supported by the following analysis.

The key to deciding what the statute requires the owner to allow is the phrase "respecting a horse which is sore" in clause (D). The inclusion of this phrase supports the "simply-allowing" interpretation, because, as we now proceed to explain, the phrase would seem to serve no purpose if the statute were intended to impose an "allowing-plus" requirement for liability.

Appendix A

With the words "respecting a horse which is sore" deleted from clause (D), § 1824(2) would prohibit:

> The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) by the owner of such horse.

The natural reading of the subsection as so rewritten would be that clause (D)'s phrase "activity described in clause (A)" (and similarly for clauses (B) and (C)) refers to "showing or exhibiting, in any horse show or horse exhibition, *of any horse which is sore*." (emphasis added). With the words "respecting a horse which is sore" omitted, there would be no reason to construe the "activity described in clause (A)" as anything other than the activity described by all the words in clause (A). Accordingly, clause (D) would prohibit the owner from "allowing" the "showing or exhibiting, in any horse show or exhibition, of any horse which is sore." The statutory language would seem to call for an allowing-plus interpretation. To be liable, the owner would have to bear some measure of responsibility (the precise measure being unnecessary to decide for present purposes) for the soring.

This construction becomes questionable, however, once the words "respecting a horse which is sore" are reinserted

in clause (D). When those words are added, what the owner is prohibited from doing is "allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore." Consequently, the "activity described in clause (A)" cannot be the activity described by all the words in clause (A): "showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." If that were the "activity described in clause (A)," then clause (D), as written in the statute, would prohibit an owner from "allowing [the showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore] respecting a horse which is sore." The words "respecting a horse which is sore" would become sloppy surplusage. Under a long-standing canon of statutory interpretation, one should avoid construing a statute so as to render statutory language superfluous. *See, e.g., Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1006 (10th Cir. 2001) (en banc). That canon is particularly apt and persuasive here, because in this short subsection the uselessness of the words "respecting a horse which is sore" could not have escaped the drafters' notice. Thus, one could reasonably conclude that in clause (D) the words "activity described in clause (A)" (and similarly for (B) and (C)) should be interpreted as "showing or exhibiting [a horse] in any horse show or horse exhibition," not "showing or exhibiting, in any horse show or horse exhibition, *of any horse which is sore*."

Proceeding, then, from this construction of the phrase "activity described in clause (A)," what clause (D) prohibits an owner from doing is "allowing [the showing or exhibiting in any horse show or horse exhibition] respecting a horse which is sore." This can reasonably be read to say that what

the owner must "allow" is merely the showing or exhibiting of the horse, but that there is no violation unless the showing or exhibiting was with respect to (*i.e.*, involved) a sore horse. In other words, the statute prohibits "simply allowing." The language might also support an allowing-plus interpretation-that what the owner is prohibited from doing is allowing the showing or exhibiting of a *sore* horse. But, as explained above, one would reach this interpretation even if the words "respecting a horse which is sore" were deleted from clause (D). Why would the drafters bother to insert the phrase "respecting a horse which is sore," if the same meaning would be conveyed (indeed, conveyed more clearly) without the phrase? Again, the USDA could properly avoid construing the statute so as to render statutory language surplusage. *See Oxy USA*, 268 F.3d at 1006.

In sum, the words "respecting a horse which is sore" in clause (D) pose a significant obstacle to an allowing-plus interpretation of the clause-an interpretation that would limit the prohibition to allowing, for example, the entry of a *sore* horse. If that were the intended meaning, it would have been easier, and cleaner, to convey the point by omitting the words "respecting a horse which is sore" from § 1824(2)(D). Reluctant to assume that the drafters were trying to be clumsy and confusing, the USDA could reasonably read the statute to say that if a sore horse is entered in a show, etc., the owner is liable simply for allowing it to be entered, regardless of whether the owner is implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring.

Moreover, the USDA's interpretation of the statute does not produce a remarkable result. In essence, it imposes on the owner a nondelegable duty not to engage in the practice of soring. This may be a heavy burden on owners. But it may be justified as a prophylactic measure necessary to ensure that trainers have no incentive to sore their horses. *See Crawford*, 50 F.3d at 51-52. Although some circuits appear reluctant to uphold sanctions when there is uncontradicted testimony that the owner instructed the trainer not to engage in soring, *see, e.g., Burton v. USDA*, 683 F.3d 280, 283 (8th Cir. 1982), one can be skeptical of self-serving testimony to that effect by the owner or trainer. Of course, when an owner can convince the USDA of his or her efforts to prevent soring, the agency may decide to impose only a light sanction or none at all. *See* 15 U.S.C. § 1825(b)(1). (Also, recall that *criminal* penalties are authorized only for *knowing* violations of § 1824. *See* 15 U.S.C. § 1825(a).)

As for Dr. McCloy's challenge to the sufficiency of the evidence, we need only find that there was sufficient evidence for the JO to be persuaded that the trainer had authority to enter Missy in the show. The JO wrote the following:

> [T]he record is clear that Respondent allowed Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration. Respondent testified that trainers who Respondent hired, including Ronal Young, entered Missy in horse shows and horse exhibitions approximately 25 times before September 4, 1998, and Ronal Young entered Missy in at least two horse shows or horse exhibitions after September 4,

> 1998 (Tr. 151, 174-75). The record contains no evidence that Respondent objected to his trainers entering Missy in horse shows or horse exhibitions, and, specifically, the record contains no evidence that Respondent objected to Ronal Young's entering Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy in that horse show. Moreover, Respondent does not contend that he did not allow Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration.

In addition, there was no evidence that Dr. McCloy ever complained to Young about having entered Missy.

In our view, the JO could reasonably infer that Young had authority to enter Missy in shows and exhibitions without obtaining specific approval for each entry.

CONCLUSION

Holding that the JO employed the proper legal standard and that his decision is supported by substantial evidence, we AFFIRM the Secretary's decision.

Appendix A

KELLY, Circuit Judge, dissenting.

The court adopts the USDA's position that an owner is liable regardless of knowledge or fault for a sore horse. *See Crawford v. USDA*, 50 F.3d 46, 50-51 (D.C. Cir. 1995). In so doing, the court ignores the language of the statute and does not consider the language as a whole and rejects an interpretation that would require the USDA to prove that the owner is somehow responsible for the soring, either by authorizing, condoning, or remaining deliberately ignorant about it. *See Lewis v. Sec'y of Agric.*, 73 F.3d 312, 315-16 (11th Cir. 1996); *Baird v. USDA*, 39 F.3d 131, 136 (6th Cir. 1994); *Burton v. USDA*, 683 F.2d 280, 282-83 (8th Cir. 1982). According to the court, the key to this issue is contained in a phrase used in § 1824(2)(D)- "respecting a horse which is sore." The court reasons that this phrase could not mean the same thing as "any horse which is sore," which is used three times before in the statute. According to the court, the phrase "any horse which is sore" does not inform the reading of § 1824(2)(D); rather, "respecting a horse which is sore" means that entering, showing, or exhibiting a horse in a horse show results in liability if the horse turns out to be sore.

In my view, the court reads far too much into what appears to be ordinary language rather than perfection in draftsmanship. This novel approach to the statute is not that of the USDA, although surely the USDA will agree with the result. According to the USDA, "[w]hether [Dr.] McCloy violated the HPA turns on the meaning of the term 'allow.'" Respondent's Br. at 15. I agree, and note that several other circuits resolved the issue based upon the meaning of "allows." Regardless of whether "respecting a horse which is sore" is surplusage, it is clear that the statute prohibits entering, showing or exhibiting a sore horse,

§ 1824(2)(A)-(B), and also prohibits an owner allowing such entry, show or exhibition. § 1824(2)(D).

The USDA contends that the act of entering a sore horse establishes liability under § 1824(2)(B), so in like manner § 1824(2)(D) should do the same for owners. Respondent's Br. at 14-16. The fact that the statute differentiates between those who directly enter, show, or exhibit horses and those who do not suggests just the opposite. The USDA's interpretation reads "allows" out of the statute. *Cf. Baird*, 39 F.3d at 137 n.10 (refusing to extend *Chevron* deference to USDA's interpretation of § 1824(2)(D) because it would render the term "allow" a nullity). Congress chose a more nuanced approach. The term "allow" connotes more than strict liability (or the liability of a guarantor)-according to the Oxford English Dictionary the term means "[t]o praise, commend, approve of," or "[t]o admit the realization of, permit." Oxford English Dictionary (2d ed. 1989).

The undisputed testimony of Dr. McCloy was that he was not even aware that Missy would be shown on the day the horse was disqualified for being sore before the show. Dr. McCloy further offered uncontradicted testimony that he did not praise, commend, or approve of soring Missy, nor did he permit it in any meaningful sense. Rather, Dr. McCloy made unannounced visits to check on Missy and, in the JO's own words, the USDA "did not prove that [Dr. McCloy's] admonitions directed to Ronal Young concerning the soring of Missy constituted merely a pretext or a self-serving ruse." *Id.* at 38. In light of these facts and my interpretation of § 1824(2)(D), I would hold that Dr. McCloy cannot be held liable for violating the HPA. *See Lewis*, 73 F.3d at 315-17.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED MARCH 22, 2002

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 99-0020

In re:

Robert B. McCloy, Jr.,

Respondent

Decision and Order

PROCEDURAL HISTORY

Craig A. Reed, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 4, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on September 4, 1998, Robert B. McCloy, Jr. [hereinafter Respondent], allowed the entry of a horse known as Ebony Threats Ms. Professor [hereinafter

Missy] for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3). On June 1, 1999, Respondent filed Respondent's Original Answer [hereinafter Answer]. Respondent admits he was the owner of Missy during all times material to this proceeding but denies he allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Answer ¶¶ 2-4).

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided at a hearing in Oklahoma City, Oklahoma, on August 22, 2000. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of Complainant. Respondent appeared pro se. Allison A. Lafferty assisted Respondent.

On January 3, 2001, Complainant filed Complainants Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof [hereinafter Complainant's Post-Hearing Brief]. On April 12, 2001, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law; and Memorandum of Points and Authorities in Support Thereof. On July 5, 2001, Complainant filed Complainant's Reply Brief.

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On August 10, 2001, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ concluded Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as alleged in the Complaint, and assessed Respondent a $2,200 civil penalty (Initial Decision and Order at 13-14).

On November 19, 2001, Complainant appealed to the Judicial Officer. On February 5, 2002, Respondent filed Respondent's Petition for Appeal of Decision and Order and Answer to the Complainant's Petition for Appeal. On February 25, 2002, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order. On February 26, 2002, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with most of the ALJ's findings of fact, the ALJ's conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), and the ALJ's assessment of a $2,200 civil penalty against Respondent. However, I also disqualify Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. Moreover, I disagree with portions of the ALJ's discussion. Therefore, while I retain portions of the ALJ's Initial Decision and Order, I do not adopt the Initial Decision and Order as the final Decision and Order.

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Complainant's exhibits are designated by CX. Respondent's exhibits are designated by RX. Transcript references are designated by Tr.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15 COMMERCE AND TRADE

. . . .

CHAPTER 44 PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term sore when used to describe a horse means that

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition,

or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

Appendix B

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from

the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each

violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

. . . .

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

Appendix B

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), 1824(2), 1825(b)(1)-(2), (c), (d)(5), 1828.

28 U.S.C.:

TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE

. . . .

PART VI PARTICULAR PROCEEDINGS

. . . .

CHAPTER 163 FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

. . . .

Appendix B

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the Federal Civil Penalties Inflation Adjustment Act of 1990

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS. The Congress finds that

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties. (b) PURPOSE The purpose of this Act is to establish a mechanism that shall

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term

(1) agency means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) civil monetary penalty means any penalty, fine, or other sanction that

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) Consumer Price Index means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

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COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT. The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION. For purposes of sub-section (a), the term cost-of-living adjustment means the percentage (if any) for each civil monetary penalty by which

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT. The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

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7 C.F.R.:

TITLE 7 AGRICULTURE

SUBTITLE A OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3 DEBT MANAGEMENT

. . . .

Subpart E Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties.* . . .

. . . .

(2) *Animal and Plant Health Inspection Service.* . . .

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. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

9 C.F.R.:

TITLE 9 ANIMALS AND ANIMAL PRODUCTS

CHAPTER I ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A ANIMAL WELFARE

. . . .

PART 11 HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to

them by trade usage or general usage as reflected in a standard dictionary, such as Webster's.

. . . .

Designated Qualified Person or *DQP* means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detector diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

. . . .

§ 11.7 Certification and licensing of designated qualified persons (DQPs).

(a) *Basic qualifications of DQP applicants.* DQP's holding a valid, current DQP license issued in accordance with this part maybe appointed by the management of any horse show, horse exhibition, horse sale, or horse auction, as qualified persons in accordance with section 4(c) of the Act, to inspect horses to detect or diagnose soring and to otherwise inspect horses, or any records pertaining to any horse for the purpose of enforcing the Act.

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Individuals who maybe licensed as DQP's under this part shall be:

(1) Doctors of Veterinary Medicine who are accredited in any State by the United States Department of Agriculture under part 161 of chapter I, title 9 of the Code of Federal Regulations, and who are:

(i) Members of the American Association of Equine Practitioners, or

(ii) Large animal practitioners with substantial equine experience, or

(iii) Knowledgeable in the area of equine lameness as related to soring and soring practices (such as Doctors of Veterinary Medicine with a small animal practice who own, train, judge, or show horses, or Doctors of Veterinary Medicine who teach equine related subjects in an accredited college or school of veterinary medicine). Accredited Doctors of Veterinary Medicine who meet these criteria may be licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department under this part without undergoing the formal training requirements set forth in this section.

(2) Farriers, horse trainers, and other knowledgeable horsemen whose past experience and training would qualify them for positions as horse industry organization or association stewards or judges (or their equivalent) and who have been formally trained and licensed as DQP's by a horse industry organization or association whose DQP program has been certified by the Department in accordance with this section.

(b) *Certification requirements for DQP programs.* The Department will not license DQP's on an individual basis. Licensing of DQP's will be accomplished only through DQP programs certified by the Department and initiated and maintained by horse industry organizations or associations. Any horse industry organization or association desiring Department certification to train and license DQP's under the Act shall submit to the Administrator a formal request in writing for certification of its DQP program and a detailed outline of such program for Department approval. Such outline shall include the organizational structure of such organization or association and the names of the officers or persons charged with the management of the organization or association. The outline shall also contain at least the following:

(1) The criteria to be used in selecting DQP candidates and the minimum qualifications

and knowledge regarding horses each candidate must have in order to be admitted to the program.

(2) A copy of the formal training program, classroom and practical, required to be completed by each DQP candidate before being licensed by such horse industry organization or association, including the minimum number of hours, classroom and practical, and the subject matter of the training program. Such training program must meet the following minimum standards in order to be certified by the Department under the Act.

(i) Two hours of classroom instruction on the anatomy and physiology of the limbs of a horse. The instructor teaching the course must be specified, and a resume of said instructor's background, experience, and qualifications to teach such course shall be provided to the Administrator.

(ii) Two hours of classroom instruction on the Horse Protection Act and regulations and their interpretation. Instructors for this course must be furnished or recommended by the Department. Requests for instructors to be furnished or recommended must be made to the Administrator in writing at least 30 days prior to such course.

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(iii) Four hours of classroom instruction on the history of soring, the physical examination procedures necessary to detect soling, the detection and diagnosis of soling, and related subjects. The instructor teaching the course must be specified and a summary of said instructor's background, experience, and qualifications to teach such course must be provided to the Administrator.

(iv) Four hours of practical instruction in clinics and seminars utilizing live horses with actual application of the knowledge gained in the classroom subjects covered in paragraphs (b)(2)(i), (ii), and (iii) of this section. Methods and procedures required to perform a thorough and uniform examination of a horse shall be included. The names of the instructors and a resume of their background, academic and practical experience, and qualifications to present such instruction shall be provided to the Administrator. Notification of the actual date, time, duration, subject matter, and geographic location of such clinics or seminars must be sent to the Administrator at least 10 days prior to each such clinic or seminar.

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(v) One hour of classroom instruction regarding the DQP standards of conduct promulgated by the licensing organization or association pursuant to paragraph (d)(7) of this section.

(vi) One hour of classroom instruction on recordkeeping and reporting requirements and procedures.

(3) A sample of a written examination which must be passed by DQP candidates for successful completion of the program along with sample answers and the scoring thereof, and proposed passing and failing standards.

(4) The criteria to be used to determine the qualifications and performance abilities of DQP candidates selected for the training program and the criteria used to indicate successful completion of the training program, in addition to the written examination required in paragraph (b)(3) of this section.

(5) The criteria and schedule for a continuing education program and the criteria and methods of monitoring and appraising performance for continued licensing of DQP's by such organization or association. A continuing education program for DQP's shall consist of not less than 4 hours of instruction per year.

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(6) Procedures for monitoring horses in the unloading, preparation, warmup, and barn areas, or other such areas. Such monitoring may include any horse that is stabled, loaded on a trailer, being prepared for show, exhibition, sale, or auction, or exercised, or that is otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction.

(7) The methods to be used to insure uniform interpretation and enforcement of the Horse Protection Act and regulations by DQP's and uniform procedures for inspecting horses for compliance with the Act and regulations;

(8) Standards of conduct for DQP's promulgated by the organization or association in accordance with paragraph (d)(7) of this section; and

(9) A formal request for Department certification of the DQP program.

The horse industry organizations or associations that have formally requested Department certification of their DQP training, enforcement, and maintenance program will receive a formal notice of certification from the Department, or the reasons, in writing, why certification of such program cannot be approved. A current

list of certified DQP programs and licensed DQP's will be published in the FEDERAL REGISTER at least once each year, and as may be further required for the purpose of deleting programs and names of DQP's that are no longer certified or licensed, and of adding the names of programs and DQP's that have been certified or licensed subsequent to the publication of the previous list.

(c) *Licensing of DQP's.* Each horse industry organization or association receiving Department certification for the training and licensing of DQP's under the Act shall:

(1) Issue each DQP licensed by such horse industry organization or association a numbered identification card bearing the name and personal signature of the DQP, a picture of the DQP, and the name and address, including the street address or post office box and zip code, of the licensing organization or association;

(2) Submit a list to the Administrator of names and addresses including street address or post office box and zip code, of all DQP's that have successfully completed the certified DQP program and have been licensed under the Act and regulations by such horse industry organization or association;

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(3) Notify the Department of any additions or deletions of names of licensed DQP's from the licensed DQP list submitted to the Department or of any change in the address of any licensed DQP or any warnings and license revocations issued to any DQP licensed by such horse industry organization or association within 10 days of such change;

(4) Not license any person as a DQP if such person has been convicted of any violation of the Act or regulations occurring after July 13, 1976, or paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976, for a period of at least 2 years following the first such violation, and for a period of at least 5 years following the second such violation and any subsequent violation;

(5) Not license any person as a DQP until such person has attended and worked two recognized or affiliated horse shows, horse exhibitions, horse sales, or horse auctions as an apprentice DQP and has demonstrated the ability, qualifications, knowledge and integrity required to satisfactorily execute the duties and responsibilities of a DQP;

(6) Not license any person as a DQP if such person has been disqualified by the Secretary from making detection, diagnosis, or inspection for the purpose of enforcing the Act, or if such person's DQP license is canceled by another horse industry organization or association.

(d) *Requirements to be met by DQP's and Licensing Organizations or Associations.* (1) Any licensed DQP appointed by the management of any horse show, horse exhibition, horse sale or auction to inspect horses for the purpose of detecting and determining or diagnosing horses which are sore and to otherwise inspect horses for the purpose of enforcing the Act and regulations, shall keep and maintain the following information and records concerning any horse which said DQP recommends be disqualified or excused for any reason at such horse show, horse exhibition, horse sale or auction, from being shown, exhibited, sold or auctioned, in a uniform format required by the horse industry organization or association that has licensed said DQP:

(i) The name and address, including street address or post office box and zip code, of the show and the show manager.

(ii) The name and address, including street address or post office box and zip code, of the horse owner.

(iii) The name and address, including street address or post office box and zip code, of the horse trainer.

(iv) The name and address, including street address or post office box and zip code, of the horse exhibitor.

(v) The exhibitors number and class number, or the sale or auction tag number of said horse.

(vi) The date and time of the inspection.

(vii) A detailed description of all of the DQP's findings and the nature of the alleged violation, or other reason for disqualifying or excusing the horse, including said DQP's statement regarding the evidence or facts upon which the decision to disqualify or excuse said horse was based.

(viii) The name, age, sex, color, and markings of the horse; and

(ix) The name or names of the show manager or other management representative notified by the DQP that such horse should be excused or disqualified and whether or not such

manager or management representative excused or disqualified such horse.

Copies of the above records shall be submitted by the involved DQP to the horse industry organization or association that has licensed said DQP within 72 hours after the horse show, horse exhibition, horse sale, or horse auction is over.

(2) The DQP shall inform the custodian of each horse allegedly found in violation of the Act or its regulations, or disqualified or excused for any other reason, of such action and the specific reasons for such action.

(3) Each horse industry organization or association having a Department certified DQP program shall submit a report to the Department containing the following information, from records required in paragraph (d)(1) of this section and other available sources, to the Department on a monthly basis:

(i) The identity of all horse shows, horse exhibitions, horse sales, or horse auctions that have retained the services of DQP's licensed by said organization or association during the month covered by the report. Information concerning the

identity of such horse shows, horse exhibitions, horse sales, or horse auctions shall include:

(A) The name and location of the show, exhibition, sale, or auction.

(B) The name and address of the manager.

(C) The date or dates of the show, exhibition, sale, or auction.

(ii) The identity of all horses at each horse show, horse exhibition, horse sale, or horse auction that the licensed DQP recommended be disqualified or excused for any reason. The information concerning the identity of such horses shall include:

(A) The registered name of each horse.

(B) The name and address of the owner, trainer, exhibitor, or other person having custody of or responsibility for the care of each such horse disqualified or excused.

(4) Each horse industry organization or association having a Department certified DQP program shall provide, by certified mail if personal service is not possible, to the trainer and owner of each horse allegedly found in violation of the Act or its regulations or otherwise disqualified or excused for any reason, the following information;

(i) The name and date of the show, exhibition, sale, or auction.

(ii) The name of the horse and the reason why said horse was excused, disqualified, or alleged to be in violation of the Act or its regulations.

(5) Each horse industry organization or association having a Department certified DQP program shall provide each of its licensed DQP's with a current list of all persons that have been disqualified by order of the Secretary from showing or exhibiting any horse, or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Department will make such list available, on a current basis, to organizations and associations maintaining a certified DQP program.

(6) Each horse industry organization or association having a Department certified DQP program shall develop and provide a continuing education program for licensed DQP's which provides not less than 4 hours of instruction per year to each licensed DQP.

(7) Each horse industry organization or association having a Department certified DQP program shall promulgate standards of conduct for its DQP's, and shall provide administrative procedures within the organization or association for initiating, maintaining, and enforcing such standards. The procedures shall include the causes for and methods to be utilized for canceling the license of any DQP who fails to properly and adequately carry out his duties. Minimum standards of conduct for DQP's shall include the following;

(i) A DQP shall not exhibit any horse at any horse show or horse exhibition, or sell, auction, or purchase any horse sold at a horse sale or horse auction at which he or she has been appointed to inspect horses;

(ii) A DQP shall not inspect horses at any horse show, horse exhibition, horse sale or horse auction in which a horse or horses owned by a member of

the DQP's immediate family or the DQP's employer are competing or are being offered for sale;

(iii) A DQP shall follow the uniform inspection procedures of his certified organization or association when inspecting horses; and

(iv) The DQP shall immediately inform management of each case regarding any horse which, in his opinion, is in violation of the Act or regulations.

(e) *Prohibition of appointment of certain persons to perform duties under the Act.* The management of any horse show, horse exhibition, horse sale, or horse auction shall not appoint any person to detect and diagnose horses which are sore or to otherwise inspect horses for the purpose of enforcing the Act, if that person:

(1) Does not hold a valid, current DQP license issued by a horse industry organization or association having a DQP program certified by the Department.

(2) Has had his DQP license canceled by the licensing organization or association.

(3) Is disqualified by the Secretary from performing diagnosis, detection, and inspection under the Act, after notice and opportunity for a hearing, when the Secretary finds that such person is unfit to perform such diagnosis, detection, or inspection because he has failed to perform his duties in accordance with the Act or regulations, or because he has been convicted of a violation of any provision of the Act or regulations occurring after July 13, 1976, or has paid any fine or civil penalty in settlement of any proceeding regarding a violation of the Act or regulations occurring after July 13, 1976.

(f) *Cancellation of DQP license.* (1) Each horse industry organization or association having a DQP program certified by the Department shall issue a written warning to any DQP whom it has licensed who violates the rules, regulations, by-laws, or standards of conduct promulgated by such horse industry organization or association pursuant to this section, who fails to follow the procedures set forth in § 11.21 of this part, or who otherwise carries out his duties and responsibilities in a less than satisfactory manner, and shall cancel the license of any DQP after a second violation. Upon cancellation of his DQP license, the DQP may, within 30 days thereafter, request a hearing before a review committee of not less than three persons appointed by the licensing horse industry organization or association. If the review committee

sustains the cancellation of the license, the DQP may appeal the decision of such committee to the Administrator within 30 days from the date of such decision, and the Administrator shall make a final determination in the matter. If the Administrator finds, after providing the DQP whose license has been canceled with a notice and an opportunity for a hearing, that there is sufficient cause for the committee's determination regarding license cancellation, he shall issue a decision sustaining such determination. If he does not find that there was sufficient cause to cancel the license, the licensing organization or association shall reinstate the license.

(2) Each horse industry organization or association having a Department certified DQP program shall cancel the license of any DQP licensed under its program who has been convicted of any violation of the Act or regulations or of any DQP who has paid a fine or civil penalty in settlement of any alleged violation of the Act or regulations if such alleged violation occurred after July 13, 1976.

(g) *Revocation of DQP program certification of horse industry organizations or associations.* Any horse industry organization or association having a Department certified DQP program that has not received Department approval of the inspection procedures provided for in paragraph (b)(6) of this section, or that otherwise fails to

comply with the requirements contained in this section, may have such certification of its DQP program revoked, unless, upon written notification from the Department of such failure to comply with the requirements in this section, such organization or association takes immediate action to rectify such failure and takes appropriate steps to prevent a recurrence of such noncompliance within the time period specified in the Department notification, or otherwise adequately explains such failure to comply to the satisfaction of the Department. Any horse industry organization or association whose DQP program certification has been revoked may appeal such revocation to the Administrator in writing within 30 days after the date of such revocation and, if requested, shall be afforded an opportunity for a hearing. All DQP licenses issued by a horse industry organization or association whose DQP program certification has been revoked shall expire 30 days after the date of such revocation, or 15 days after the date the revocation becomes final after appeal, unless they are transferred to a horse industry organization or association having a program currently certified by the Department.

9 C.F.R. §§ 11.1, .7 (1998) (footnotes omitted).

Appendix B

FINDINGS OF FACT

1. Respondent is an individual who resides and has his place of business in Norman, Oklahoma. Respondent has been a full-time physician practicing for 32 years and is director of medical services at the Norman Regional Hospital, in Norman, Oklahoma, where he was in charge of the Emergency Department for 29 years. Respondent was elected by his peers to serve as chief-of-staff at Norman Regional Hospital in 1992. In addition, Respondent has served his community for many years, including a seat on the board of directors for the United Way for 6 years. (Answer ¶ 1; RX D, RX E, RX F.)

2. Respondent purchased Missy in December 1995 and placed her in training at the David Landrum Stables where she remained for approximately 1 year. Her trainer at the David Landrum Stables, Link Webb, left the David Landrum Stables and took Missy with him. Because Mr. Webb was having trouble getting Missy to canter, he suggested that Respondent move Missy to Young's Stables to be trained by Ronal Young, which Respondent did in August 1997. At the time of the violation alleged in the Complaint, Missy lived at Young's Stables in Lewisberg, Tennessee, and thus resided hundreds of miles from Respondent's residence and place of business. Ronal Young was Missy's trainer from August 1997 to approximately February 1999. (CX 2, CX 4 at 1; Tr. 151-52, 174-76, 187.)

3. During the period that Respondent owned Missy, the trainers hired by Respondent showed Missy in horse shows approximately 25 times and, until the violation alleged

in the Complaint, Missy had not been found to be sore (CX 4 at 1; Tr. 151, 161-62).

4. Respondent made clear to each trainer that he only purchased horses that walked naturally, in other words they did not need to be sored (Tr. 15 0-52, 170-71).

5. On September 4, 1998, Respondent owned Missy (CX 4 at 1; Tr. 182, 185). On September 4, 1998, Missy's trainer, Ronal Young, entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Missy at the show (CX 1 at 3, CX 4; Tr. 19-20, 189).

6. On September 4, 1998, Mark Thomas and Ira Gladney, Designated Qualified Persons,[1] inspected Missy just prior to her scheduled participation in the 60th Annual Tennessee Walking Horse National Celebration and disqualified her from being shown or exhibited based upon her general appearance, locomotion, and reaction to palpation (CX 3b at 1, CX 3c; RX A; Tr. 51-52, 67, 69).

7. On September 4, 1998, Dr. John Michael Guerdon and Dr. Ruth E. Bakker, veterinary medical officers employed by the United States Department of Agriculture, examined Missy when she was entered in the 60th Annual Tennessee

1. A Designated Qualified Person or DQP is an individual appointed by the management of a horse show and trained under a United States Department of Agriculture-sponsored program to inspect horses for compliance with the Horse Protection Act (15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, .7).

Walking Horse National Celebration and found her to be sore as that term is defined in the Horse Protection Act[2] (CX 3a, CX 3b, CX 3c, CX 4 at 2; Tr. 46-56, 85, 130-39). Respondent concedes Missy was sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy at the show (CX 4; Tr. 152-53, 155, 161-62).

8. When Respondent first attended the 60th Annual Tennessee Walking Horse National Celebration, Respondent did not know Missy was at the 60th Annual Tennessee Walking Horse National Celebration. Respondent first became aware that Ronal Young planned to show Missy when Ronal Young's wife, Judy Young, approached Respondent in the stands at the 60th Annual Tennessee Walking Horse National Celebration and informed Respondent that Missy had been turned down during a pre-show inspection. Respondent was at the 60th Annual Tennessee Walking Horse National Celebration to see two of his other horses, Silver Dollar and A Shot of Gen. Upon being told Missy had not passed inspection, Respondent attempted to find Ronal Young and Missy but discovered they had both left the grounds. When Respondent confronted Ronal Young the next day, Ronal Young assured Respondent that what had happened did not involve Respondent and Respondent should not worry. (CX 4 at 2; Tr. 152-53, 169, 194-95.)

9. Notwithstanding the distance which existed between Respondent's place of business and residence and Young's Stables, Respondent made unannounced visits to Young's

2. *See* 15 U.S.C. § 1821(3).

Stables and never found Missy to be sore. During these visits to Young's Stables, Missy's gait appeared to Respondent to be free, flowing, and natural. (Tr. 152-53, 170.)

10. Before employing Ronal Young to board, train, and show Missy, Respondent talked to other trainers to determine whether Ronal Young had previously entered or exhibited a sore horse (Tr. 162-63, 171, 173, 176). Ronal Young had previously been cited for violating the Horse Protection Act, which information was available to Respondent from the Animal and Plant Health Inspection Service (Tr. 212-14, 220-23). However, during the period material to this proceeding, Respondent did not know about Ronal Young's previous citation for violating the Horse Protection Act, and Respondent was unaware of a way to have found that information or to have checked Ronal Young's record (Tr. 162-63, 171, 176-77).

11. Respondent did not maintain control over the training methods which he expected Ronal Young to select and employ when training Missy (CX 4 at 2). Respondent testified that he instructed Ronal Young not to sore or otherwise abuse Missy Jr. 150-52, 170-71, 194-95). Ronal Young admitted in a written statement that Respondent advised him to refrain from soring Missy or from doing any act which might make Missy be in violation of the Horse Protection Act (RX B). Tim Gray, another trainer hired by Respondent, also submitted a written statement which supports Respondent's testimony that he instructed trainers not to sore his horses (RX C).

12. Respondent continued to employ Ronal Young to board, train, and show Missy for approximately 6 months after Ronal Young entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration while she was sore (Tr. 174-76, 187).

DISCUSSION

Congress found the soring of horses is cruel and inhumane and horses shown or exhibited which are sore, where such soreness improves the performance . . . , compete unfairly with horses which are not sore.[3] Congress made it unlawful to: (1) show or exhibit a sore horse in any horse show or horse exhibition; (2) enter for the purpose of showing or exhibiting a sore horse in any horse show or horse exhibition; or (3) allow the showing or exhibition of a sore horse in any horse show or horse exhibition.[4] The term sore describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving.[5]

To prove a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), Complainant must establish by a preponderance of evidence[6] that: (1) the person

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3. *See* 15 U.S.C. § 1822(1)-(2).

4. *See* 15 U.S.C. § 1824(2)(A)-(B), (D).

5. *See* 15 U.S.C. § 1821(3).

6. The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act

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(5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in an administrative proceeding conducted under the Horse Protection Act is preponderance of the evidence. *In re William J. Reinhart*, 60 Agric. Dec. __, slip op. at 27 n.7 (Jan. 23, 2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed, No.* 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed, No.* 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1 186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric.

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charged is the owner of the horse in question; (2) the horse was shown, exhibited, or entered in a horse show or exhibition; (3) the horse was sore at the time it was shown, exhibited, or entered; and (4) the owner allowed the showing, exhibition, or entry.

Respondent admits he owned Missy on September 4, 1998 (Answer ¶ 2). Complainant presented evidence sufficient to raise the statutory presumption[7] that Missy was sore on September 4, 1998, when Ronal Young entered Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy. Complainant proved by a preponderance of the evidence that Missy was sore as that term is defined in the Horse Protection Act[8] (CX 3a, CX 3b, CX 3c, CX 4 at 2; Tr. 46-56, 85, 130-39). Respondent failed to present evidence sufficient to rebut either Com-

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Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, *510* U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

7. *See* 15 U.S.C. § 1825(d)(5).

8. *See* 15 U.S.C. § 1821(3).

plainant's *prima facie* case or the statutory presumption. Respondent concedes that Missy was sore when Ronal Young, the trainer Respondent hired to train Missy, entered Missy for the purpose of showing or exhibiting Missy at the 60th Annual Tennessee Walking Horse National Celebration (CX 4 at 2; Tr. 152-53, 155, 161-62).

The issue in this case is whether Respondent allowed the entry of Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration, while she was sore, and thus violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

The United States Department of Agriculture has long held that a horse owner who allows a person to enter the owner's horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition.[9] The evidence establishes

9. *See, e.g., In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 589-90 (1997) (stating an owner who allows a person to enter the owner's horse in a horse show or horse exhibition for the purpose of exhibiting the horse is an absolute guarantor that the horse will not be sore when exhibited), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 979 (1996) (stating an owner who allows a person to exhibit a horse in a horse show or horse exhibition is an absolute guarantor that the horse will not be sore when the horse is exhibited), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997);

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that Respondent did not know that Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration until he was informed by Judy Young that Missy had been turned down (CX 4 at 2; Tr. 152-53). Nonetheless, the record is clear that Respondent allowed Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration. Respondent testified that trainers who Respondent hired, including Ronal Young, entered Missy in horse shows and horse exhibitions approximately 25 times before September 4, 1998, and Ronal Young entered Missy in at least two horse shows or horse exhibitions after September 4, 1998 (Tr. 151, 174-75). The record contains no evidence that Respondent objected to his trainers entering Missy in horse shows or horse exhibitions, and, specifically, the record contains no evidence that Respondent objected to Ronal Young's entering Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy in that horse show. Moreover, Respondent does not contend that he did not allow Ronal Young to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration. Under these circumstances, Respondent was a guarantor that Missy would not be sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration. Complainant proved by a preponderance of the evidence that Missy was sore when Ronal Young entered Missy in the 60th Annual

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In re John T. Gray (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 888 (1996) (stating horse owners who allow the entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore when entered).

Tennessee Walking Horse National Celebration. Thus, Respondent breached his guarantee as a horse owner that Ronal Young (a person who Respondent hired to board, train, and show Missy and a person allowed by Respondent to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration) would not enter Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy while she was sore. Based upon Respondent's breach of this guarantee, I conclude that, on September 4, 1998, Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Respondent cannot escape liability for a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) based on his credible testimony that, prior to the 60th Annual Tennessee Walking Horse National Celebration, he did not have actual knowledge that Ronal Young would enter Missy in the show or based on his credible testimony that he instructed Ronal Young not to sore Missy.

Respondent urges that I refrain from applying the United States Department of Agriculture's test to determine whether he violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Instead, Respondent requests that I apply the tests to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) which have been adopted by the United States Court of Appeals for the Sixth Circuit,

the United States Court of Appeals for the Eighth Circuit, and the United States Court of Appeals for the Eleventh Circuit, as follows:

[BY DR. McCLOY:]

> In summary, I wish the facts of this case would be considered in the case — in the light of other cases, Baird v USDA, 39 Fed 3d 131 at the Sixth Circuit; Burton v USDA, 683 Fed 2d 280 in the Eighth Circuit; and Lewis v the Secretary of Agriculture, 73 Fed 3d 312 in the Eleventh Circuit.
>
> I believe if one looks at the evidence in this case with respect to these cases, that the hearing would result in a defense verdict.

Tr. 195.

However, the tests adopted by the United States Court of Appeals for the Sixth Circuit, the United States Court of Appeals for the Eighth Circuit, and the United States Court of Appeals for the Eleventh Circuit are inapposite. Respondent may obtain judicial review of this Decision and Order in the court of appeals of the United States for the circuit in which Respondent resides or has his place of business or the United States Court of Appeals for the District of Columbia Circuit.[10] Respondent does not reside in or have his place of business in the Sixth Circuit, the Eighth Circuit, or the Eleventh Circuit. Instead, the record establishes that

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10. *See* 15 U.S.C. § 1825(b)(2), (c).

Respondent resides in and has his place of business in Oklahoma (Compl. ¶ 1; Answer ¶ 1; RX D). Therefore, Respondent may obtain judicial review of this Decision and Order in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit.

Respondent does not cite and I cannot locate any decision by the United States Court of Appeals for the Tenth Circuit in which the Court addresses the test to be used to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). The United States Court of Appeals for the District of Columbia Circuit has addressed the test to be used to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) and has specifically rejected the test adopted by the United States Court of Appeals for the Sixth Circuit and the test adopted by the United States Court of Appeals for the Eighth Circuit, as follows:

> That brings us to petitioner's second argument: that on the facts presented, the Department could not conclude that petitioner allow[ed] the entry of a sore horse. This textual argument turns on the meaning of the word allow. The Department contends that an owner can always *prevent* a horse from being sored, and that therefore an owner is liable if her horse is entered, showed, or exhibited while sore. Petitioner, on the other hand, maintains that the word allow necessarily implies knowledge of the sore condition, or at least requires proof of circumstances that would alert the owner that

someone normally, we would suppose, the trainer was soring the horse. In this case, it will be recalled, the petitioner testified, without contradiction, that she instructed the trainer *not* to sore the horse. Petitioner accuses the Department of interpreting the word allow so as to create absolute liability for an owner regardless of the circumstances that caused a horse's soreness.

This issue has generated much discussion and concern in our fellow circuits. The Eighth Circuit, *Burton v. United States Dep't of Agriculture*, 683 F.2d 280, 282-83 (8th Cir. 1982), and the Sixth Circuit, *Baird v. United States Dep't of Agriculture*, 39 F.3d 131, 137-38 (6th Cir. 1994), have rejected the Department's interpretation and have held that if an owner produced uncontradicted evidence that he or she instructed a trainer not to sore the horse, the Department must in turn show that the instruction was a ruse or that the owner nevertheless had knowledge that the horse was sore. *Compare Thornton v. United States Dep't of Agriculture*, 715 F.2d 1508, 1511-12 (11th Cir. 1983); *see also Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1488-89 (9th Cir. 1984).

We respectfully disagree with our sister circuits who have required the Department to produce evidence rebutting an owners prophylactic instruction. Congress did not state that an owner is liable if she *authorizes* or *causes* a horse to be

sored. The word allow is a good deal softer, more passive, and it can have varying meanings, *e.g.*, to permit by neglecting to restrain or prevent, or to make a possibility: provide opportunity or basis or (most strongly) to intend or plan. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 58 (1971). Since the word is ambiguous, we are obliged under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984), to defer to the Department's interpretation of the term (so long as reasonable), which we take to be among the weaker ones in Webster's, to permit by neglecting to restrain or prevent. Accordingly, if an owner enters or shows a sore horse, the Department assumes that he or she has not *prevented* someone in his or her employ from soring the horse. And, by *itself*, testimony that the owner instructed the trainer not to sore the horse will not exculpate the owner. In so concluding, the Department merely takes into account the obvious proposition that the owner has the power to control his or her agents.

The Sixth Circuit recognized (in a footnote) that *Chevron* governed review of the Department's interpretation, but concluded the Department's interpretation was unreasonable. *Baird*, 39 F.3d at 137 n.10. The court looked to Black's Law Dictionary, which does state that allow has no rigid or precise meaning but then goes on to say, [t]o sanction, either directly or indirectly, as opposed to merely suffering a thing to be done (even that dictionary does, in a contradictory fashion, submit as an alternative, to suffer; to tolerate). From that language the court concluded that

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> [A]'s the above definition makes clear, there are basically two ways to allow something to happen: either directly, *e.g.*, explicitly condoning or authorizing the conduct or act in question; or indirectly, *e.g.*, by failing to prevent such conduct or act in other words, by looking the other way or by burying one's head in the sand. . . . Liability would follow in this latter instance if, for example, an owner had cultivated a training atmosphere conducive to soring, or had done nothing to dissuade the practice, knowing the tactics of his trainers in particular and/or the pervasiveness of the practice in general.

Baird v. U.S. Dep't of Agriculture, 39 F.3d at 137.

The Sixth Circuit's interpretation of the language is certainly plausible, but we do not agree with its conclusion that the Department's interpretation is unreasonable or is functionally equivalent to the imposition of absolute liability. The Department merely holds the owner responsible for the actions of her agents (particularly the trainer) and will not permit the owner to escape liability by testifying that she instructed a trainer not to sore. It might well be an entirely different case we have been able to find none if an owner were able to show that a horse was sored by a stranger or someone not under, the owner's control. And, it is of course conceivable that a trainer would flatly disobey an owner's instruction. If an owner produced such evidence together, presumably, with a showing that the trainer had been terminated it might well be that the Department could not conclude reasonably that the owner allowed the entry of a

sore horse. That is not this case, however, and that apparently has not been the pattern of most of these cases.

The Sixth Circuit recognized the government's concern that an owner could easily offer evidence of a prophylactic instruction without real fear of contradiction (trainers would be unlikely to cross the owners), but the court concluded that this risk was simply a hazard of litigation: the government still had the burden of disproving the sincerity of the instruction. *Baird*, 39 F.3d at 138 n.11. That amounts to putting an enormous burden and expense on the Administrator to establish how the horse came to be sored, a burden that would be required if the statute called for a sanction if an owner caused or authorized the soring. Since the statute uses the term allow *(i.e.*, permit, or does not prevent), we do not think the Administrator must shoulder such a task just because the owner produces evidence of her instruction to the trainer. After all, the instruction is not introduced to establish that the horse was not sore but rather to relieve the owner of any responsibility for the soreness. Yet the instruction, by itself, even were it deemed totally sincere, is not necessarily inconsistent with the proposition that the owner permitted for example, through neglect or lack of vigilance the horse to be sored. It is unimaginable that an owner would be unfamiliar with soring practices generally, as well as the Department's enforcement efforts, therefore if an owner's horse were sored, notwithstanding her instruction, she could be said to have put her head in the sand unless something quite extraordinary occurred.

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> The Department apparently believes that an owner can and must do a good deal more than simply give the bare instruction to be thought to have prevented her own horse from being entered in a sore condition. The issue does not involve so much an allocation of burdens, as the Sixth Circuit thought, but rather the weight the Department must give to evidence of the owner's instruction in light of the Department's interpretation of the statute. We do not think, in that context, it is unreasonable for the Department to conclude that such an instruction will not exculpate an owner for the statutory responsibility for allowing the entry of a sore horse.

Crawford v. United States Dep't of Agric., 50 F.3d 46, 50-52 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995) (footnotes omitted).

Based on the test in *Crawford*, *I* conclude that Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy in the 60th Annual Tennessee Walking Horse National Celebration while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Respondent hired Ronal Young to train Missy in August 1997 and Respondent retained Ronal Young as Missy's trainer until approximately February 1999. During this period, Respondent allowed Ronal Young to enter Missy in a number of horse shows or horse exhibitions, including the 60th Annual Tennessee Walking Horse National Celebration. Respondent had the power to control his trainer and under *Crawford*, Respondent's testimony that he

instructed Ronal Young not to sore Missy does not permit Respondent to escape liability for his violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Moreover, even if I were to apply the test adopted by the United States Court of Appeals for the Eighth Circuit or the test adopted by the United States Court of Appeals for the Eleventh Circuit to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as Respondent urges, I would not dismiss the Complaint. The United States Court of Appeals for the Eighth Circuit in *Burton* held, as follows:

> [W]e hold that the owner cannot be held to have allowed a sore horse to be shown [in violation of 15 U.S.C. § 1824(2)(D)] when the following three factors are shown to exist: (1) there is a finding that the owner had no knowledge that the horse was in a sore condition, (2) there is a finding that a Designated Qualified Person examined and approved the horse before entering the ring, and (3) there was uncontradicted testimony that the owner had directed the trainer not to show a sore horse. All of these factors taken together are sufficient to excuse an owner from liability.

Burton v. United States Dep't of Agric., 683 F.2d 280, 283 (8th Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit in *Lewis* adopted *Burton* with the caveat that the owner's directions to the trainer not to show a sore horse must be meaningful, as follows:

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> The caveat we put on *Burton* relates to the third factor. Compliance with it (along with the other two factors), frees the owner of the ineluctable consequences of entry plus the fact of soreness and it frees him of being found to allow in the passive sense described in *Baird* by hiding his head or doing nothing. But compliance with the third element must be meaningful rather than purely formal or ritualistic. The owner may give firm and certain and suitably repeated directions not to sore and not to show a horse that is in a sore condition. He may maintain a training environment that discourages soring or makes it impossible. He may carry out inspection practices that tend to reveal any efforts to sore. But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion.

Lewis v. Secretary of Agric., 73 F.3d 312, 317 (11th Cir. 1996).

The evidence clearly establishes that on September 4, 1998, two Designated Qualified Persons examined Missy during a pre-show inspection at the 60th Annual Tennessee Walking Horse National Celebration and disqualified her from showing based upon her general appearance, locomotion, and reaction to palpation (CX 3b at 1, CX 3c; RX A; Tr. 51-52, 67, 69). The record contains no evidence that any Designated Qualified Person examined and approved Missy for showing or exhibition at the 60th Annual Tennessee Walking Horse National Celebration. Therefore, Respondent

does not meet the requirement in *Burton* and *Lewis* that a Designated Qualified Person examine and approve the horse before the horse enters the ring.

However, if I were to apply the test adopted by the United States Court of Appeals for the Sixth Circuit in *Baird*, I would dismiss the Complaint against Respondent. The Sixth Circuit sets forth the test to determine whether an owner has allowed the entry of the owner's horse while the horse was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), as follows:

> In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonitions the owner directed to his trainers concerning the soling of horses constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824.

Baird v. United States Dep't of Agric., 39 F.3d 131, 137 (6th Cir. 1994) (footnote omitted).

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In *Baird*, the affirmative step to prevent the soring that occurred was the horse owner's direction to his trainers that his horses were not to be sored and his warning that he would take the horses away from trainers he suspected of soring his horses. The Court in *Baird* held that the horse owner's testimony alone, absent evidence to refute it, was sufficient to show that the horse owner did not allow his trainers to enter and exhibit his horses while sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). *Baird v. United States Dep't of Agric.*, 39 F.3d at 138.

Respondent testified that he took affirmative steps to prevent the soring of Missy. Specifically, Respondent testified that he instructed Ronal Young not to sore Missy. Moreover, Respondent introduced Ronal Young's written statement (RX B) which corroborates Respondent's testimony that he instructed Ronal Young not to sore Missy. Complainant did not prove that Respondent's admonitions directed to Ronal Young concerning the soring of Missy constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). However, again, I note that Respondent cannot obtain judicial review by the United States Court of Appeals for the Sixth Circuit and *Baird* is inapposite.

CONCLUSION OF LAW

On September 4, 1998, Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville,

Tennessee, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

SANCTION

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation effective September 2, 1997, adjusted the civil monetary penalty that maybe assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from $2,000 to $2,200.[11] The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.[12]

Congress has recognized the seriousness of soring horses. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature

11. *See* 62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(vii).

12. *See* 15 U.S.C. § 1825(c).

of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of soring horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or knocker boots on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust

them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained champion horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

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> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

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Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides that in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Respondent a $2,200 civil penalty (Complainants Post-Hearing Brief at 26-27). The extent and gravity of Respondent's prohibited conduct are great. Two United States Department of Agriculture veterinary medical officers found Missy extremely sore. Dr. John Michael Guedron described Missy's pain responses to his examination of her left leg and foot and right leg and foot as strong (CX 3b at 1-2), and Dr. Ruth E. Bakker described Missy's pain responses to her examination of Missy's right forelimb and left forelimb as pronounced (CX 3c at 2).

Before employing Ronal Young to board, train, and show Missy, Respondent made no attempt, other than talking to other trainers, to determine whether Ronal Young had previously entered or exhibited a sore horse (Tr. 162-63, 171, 173, 176). Ronal Young had previously been cited for violating the Horse Protection Act, which information was available to Respondent from the Animal and Plant Health Inspection Service (Tr. 212-14, 220-23). However, during the period material to this proceeding, Respondent did not

know about Ronal Young's previous citation for violating the Horse Protection Act, and Respondent was unaware of a way to have found that information or to have checked Ronal Young's record (Tr. 162-63, 171, 176-77). While Respondent did not maintain control over the training methods which he expected Ronal Young to select and employ when training Missy, Respondent instructed Ronal Young not to sore or otherwise abuse Missy and made several unannounced visits to Young's Stables to determine how Missy was being treated (CX 4; Tr. 150-53, 170-71, 194-95). Weighing all the circumstances, I find Respondent is culpable, but not highly culpable, for the violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Respondent presented no evidence that he is unable to pay a $2,200 civil penalty. Further, Respondent is a physician and a $2,200 civil penalty would not adversely affect Respondent's ability to continue in business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[13] Based on the

13. *See, e.g., In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed, No.* 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen

(Cont'd)

factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for each violation of the Horse Protection Act. Therefore, I assess Respondent a $2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

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Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

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The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[14]

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act

14. *See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[15]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tool must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976

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15. *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in*, 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. De c. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

COMPLAINANT'S APPEAL PETITION

Complainant raises 12 issues in Complainant's Petition for Appeal of Decision and Order [hereinafter Complainant's Appeal Petition]. First, Complainant contends the ALJ's finding that Respondent's testimony is credible, is error (Complainant's Appeal Pet. at 3-6).

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[16] The Administrative

16. *See also In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. __, slip op. at 44 (July 19, 2001), *appeal docketed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Sept. 10, 2001); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1053-54 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997);

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In re Volpe Vito, Inc., 56 Agric. Dec. 166, 245 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec, 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat* Co., 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating the substantial evidence standard is not modified in anyway when the Board and the hearing examiner disagree); JCC, *Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating agencies have authority to make independent credibility determinations without the opportunity to

(Cont'd)

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Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

. . . .

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either

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view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary ofHealth and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

> in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review.* . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather* Co., 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

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ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[17]

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17. *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. __, slip op. at 46-47 (July 19, 2001), *appeal docketed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Sept. 10, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, No. 00-3173, 2001 WL 401594 (10th Cir. Apr. 20, 2001) (unpublished); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 198 8); *In re King Meat Packing Co.*, 40 Agric. D cc. 552, 55 3 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (197 3); *In re Card well Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

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Complainant contends the ALJ based her credibility finding on Respondent's testimony that he affirmatively gave the trainer instructions regarding the non-abuse of his horses which included soring (Initial Decision and Order at 5) but Respondent never testified that he gave Ronal Young any instruction not to sore Missy (Complainant's Appeal Pet. at 6-7). I disagree with Complainant's contention that Respondent never testified that he gave Ronal Young instructions not to sore Missy. Respondent testified that he instructed Ronal Young not to sore Missy, as follows:

> [BY DR. McCLOY:]
>
> Ebonys Threats Miss Professor was purchased in January of 95. She went directly to David Landrum's [phonetic] stables. She then, when Link Webb left David Landrum, went with Link Webb. As I mentioned, we were unable to get the horse to canter and Link felt that Ronal Young would be the person to do that, so I called Ronal about August of 97, having had no contact with Ronal since then.
>
> . . . .
>
> Once again, I told Ronal that the training —the reason the horse was moved to him was because it would not canter. Its show record was excellent in terms of a flat walk and a running walk. There was no need to sore the horse, but I did expect him to stay in compliance with the Horse Protection Act, and he understood that.
>
> . . . .

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[BY MS. CARROLL:]

Q. And then you are here testifying that you informed Mr. Young not to sore your horse?

[BY DR. McCLOY:]

A. I informed Mr. Young to not sore the horse.

Q. Okay.

A. I wanted the horse in compliance with the Horse Protection Act and I did not want to own a horse that had to be sored.

Q. And —

A. And I've told all trainers that.

Tr. 151-52, 170-71.

Moreover, Respondent's testimony that he instructed Ronal Young not to sore Missy is corroborated by Ronal Young's written statement in which he states [w]hen Dr. McCloy placed Miss Ebony's Threat's Professor in training with me, he specifically advised me to refrain from soring his horse or from doing any act which might make his horse in violation of the Horse Protection Act (RX B).

Complainant further contends the ALJ cannot both find Respondent credible and conclude Respondent violated the Horse Protection Act (Complainant's Appeal Pet. at 7-11). I disagree with Complainant's contention that the ALJ cannot find Respondent credible and conclude Respondent violated the Horse Protection Act. Respondent owned Missy at all times material to this proceeding. Respondent retained Ronal Young to board, train, and show Missy from August 1997 to approximately February 1999. Respondent allowed Ronal Young to enter Missy in horse shows, including the 60th Annual Tennessee Walking Horse National Celebration. On September 4, 1998, Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy at the show while Missy was sore. (CX 1 at 3, CX 2, CX 3a, CX 3b, CX 3c, CX 4; Tr. 19-20, 46-56, 85, 130-39, 151-52, 174-76, 182, 185, 187, 189.) The United States Department of Agriculture holds that a horse owner who allows a person to enter the owner's horse in a horse show or horse exhibition for the purpose of showing or exhibiting the horse is a guarantor that the horse will not be sore when the horse is entered in that horse show or horse exhibition.[18] By itself, credible testimony that the horse owner instructed the person who enters the horse not to sore the horse will not exculpate the owner from a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, the ALJ could find credible Respondent's testimony that he instructed Ronal Young not to sore Missy and at the same time conclude Respondent allowed the entry of Missy for the purpose of showing or exhibiting Missy as entry number 654 in class

18. See note 9.

number 121 at the 60th Annual Tennessee Walking Horse National Celebration, while Missy was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Complainant further contends the ALJ's finding that Respondent's testimony that he instructed Ronal Young not to sore Missy is credible ignores statements in Respondent's own affidavit and Michael Ray's testimony (Complainants Appeal Pet. at 11-13).

Respondent states in his affidavit I have given Mr. Young no verbal or written instructions concerning the training of Ebonys Threats. Mr. Young was given complete custody in training the horse. (CX 4 at 2.) Michael Ray, an investigator employed by the Animal and Plant Health Inspection Service, testified that he prepared Respondent's affidavit based on his interview of Respondent. Michael Ray further testified that, when he asked Respondent about the instructions he had given to Ronal Young, Respondent stated he gave no instructions to Ronal Young. (Tr. 8-10.) Respondent's affidavit appears to be inconsistent with Respondent's testimony that he instructed Ronal Young not to sore Missy and this apparent inconsistency causes me some doubt about the ALJ's credibility determination. However, Respondent testified that what he meant in his affidavit was that he gave Ronal Young no instructions regarding legal and non-abusive methods of training Missy (Tr. 194). Moreover, Ronal Young's written statement (RX B) corroborates Respondent's testimony that he instructed Ronal Young not to sore Missy. The ALJ found Respondent credible, and, in light of Respondent's explanation, Ronal Young's written statement,

and the great weight I give to the ALJ's credibility determination, I do not set aside the ALJ's credibility determination based on the apparent conflict between Respondent's testimony and Respondent's affidavit.

Second, Complainant states he does not see why the ALJ would express surprise about Complainant's characterization of Respondent's testimony as self-serving (Complainants Appeal Pet. at 13-14).

The ALJ states Complainant's characterization of Respondent's testimony is surprising, as follows:

> The Complainant seeks to show that Dr. McCloy cannot be believed. In furtherance of its theory that Dr. McCloy allowed the entry, the Government claims that his testimony is self-serving, and not credible. It is surprising the Government would say this.

Initial Decision and Order at 8.

The record does not reveal the reasons for the ALJ's surprise about Complainant's characterization of Respondent's testimony; therefore, I am not able to provide Complainant with the reasons for the ALJ's surprise. However, the reasons for the ALJ's surprise have no bearing on the disposition of this proceeding. Therefore, I do not remand this proceeding to the ALJ to provide the reasons for her surprise regarding Complainant's characterization of Respondent's testimony. Moreover, I am not surprised by

Complainant's characterization of Respondent's testimony as self-serving. Therefore, I do not adopt the ALJ's expression of surprise.

Third, Complainant contends the ALJ erroneously states it is Respondent's obligation and duty to explain what occurred (Complainants Appeal Pet. at 14).

The ALJ states that it is Respondent's obligation and duty to explain what occurred (Initial Decision and Order at 8). Neither the Administrative Procedure Act nor the Rules of Practice requires a respondent to testify and explain what occurred. Therefore, I agree with Complainant's contention that the ALJ's statement that it is Respondent's obligation and duty to explain what occurred, is error, and I do not adopt the ALJ's statement that it is Respondent's obligation and duty to explain what occurred.

Fourth, Complainant states the ALJ's statement that self-serving testimony may be received and found credible, is error (Complainants Appeal Pet. at 14-15).

The ALJ states [t]here has never been any legal principle that prevents self-serving testimony, or, that precludes such testimony as not credible when the finder of fact (frequently a jury) finds it to b e credible (Initial Decision and Order at 9). Neither the Administrative Procedure Act nor the Rules of Practice prohibits the reception of self-serving testimony. Further, neither the Administrative Procedure Act nor the Rules of Practice provides that self-serving testimony cannot be found credible. Numerous courts have held that self-serving testimony is admissible and may be found

credible.[19] Therefore, I reject Complainant's contention that the ALJ's statement that self-serving testimony may be received and found credible, is error.

Fifth, Complainant contends the ALJ imprecisely found Respondent's failure to fire Ronal Young, after Missy was found to be sore, constitutes Respondent's condoning Ronal Young's treatment of Missy. Complainant contends the ALJ would have been more accurate if she had found that Respondent's failure to fire Ronal Young indicates that Respondent's instruction to Ronal Young not to sore Missy was not genuine. (Complainant's Appeal Pet. at 15.)

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19. *Winchester Packaging, Inc. v. Mobile Chemical Co.*, 14 F.3d 316, 319 (7th Cir. 1994) (stating self-serving testimony is not as a matter of law unworthy of belief); *Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 620 (2d Cir. 1991) (stating the fact that testimony may be self-serving goes to its weight rather than its admissibility); *Wilson v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 841 F.2d 1347, 1355 (7th Cir.) (finding self-serving testimony given by one of the parties was not inherently incredible), *cert. dismissed*, 487 U.S. 1244 (1988); *Shanklin Corp. v. Springfield Photo Mount Co.*, 521 F.2d 609, 616 (1st Cir. 1975) (stating the district court did not err in accepting testimony as credible simply because it was self-serving), *cert. denied*, 424 U.S. 914 (1976); *Robinson v. United States*, 308 F.2d 327, 332 (D.C. Cir. 1962) (rejecting an argument that self-serving testimony should not have been received; stating that an objection to self-serving testimony goes to the weight and not to the substance of the testimony), *cert. denied*, 374 U.S. 836 (1963); *NLRB v. Walton Manufacturing Co.*, 286 F.2d 26, 28 (5th Cir. 1961) (stating a witness sworn testimony is not to be discredited because it supports the witness contention).

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Respondent testified that he left Missy in Ronal Young's custody until February 1999, approximately 6 months after Respondent learned Missy had been disqualified during a pre-show inspection from being shown or exhibited at the 60th Annual Tennessee Walking Horse National Celebration (Tr. 174-76). The ALJ states that, by leaving Missy with Ronal Young for a period of months after Missy had been disqualified from being shown or exhibited at the 60th Annual Tennessee Walking Horse National Celebration, Respondent was indirectly condoning what had previously occurred (Initial Decision and Order at 13). I infer the ALJ's reference to what had previously occurred is a reference to Ronal Young's entry of Missy for the purpose of showing or exhibiting Missy in the 60th Annual Tennessee Walking Horse National Celebration while Missy was sore.

Respondent removed Missy from Ronal Young's custody in February 1999, when he found a suitable trainer; after September 4, 1998, Respondent requested Ronal Young not to sore Missy again; after September 4, 1998, Respondent extracted a promise from Ronal Young that he would not sore Missy again; and Respondent examined Missy each of the two times she was shown during the period she remained in Ronal Young's custody after September 4, 1998 (Tr. 174-76). Respondent's eventual removal of Missy from Ronal Young's custody and the precautions Respondent took to prevent Ronal Young's soring Missy after September 4, 1998, do not appear to be the actions of a horse owner who was indirectly condoning the entry of his horse in a horse show while the horse was sore. Based on the record before me, I agree with Complainant that Respondent's failure to remove Missy from Ronal Young's custody expeditiously

after she was disqualified from being shown or exhibited at the 60th Annual Tennessee Walking Horse National Celebration does not prove that Respondent was indirectly condoning what had previously occurred. Therefore, I do not adopt the ALJ's statement that Respondent was indirectly condoning what had previously occurred.

Moreover, I agree with Complainant that Respondent's failure to remove Missy from Ronal Young's custody after September 4, 1998, is an indication that Respondent's instruction not to sore Missy was not genuine. However, Respondent's testimony that he instructed Ronal Young not to sore Missy is corroborated by Ronal Young's written statement (RX B) and I give great weight to the ALJ's determination that Respondent's testimony that he instructed Ronal Young not to sore Missy is credible. Therefore, I reject Complainant's contention that Respondent's instruction not to sore Missy was not genuine.

Sixth, Complainant contends the ALJ's finding that Respondent made unannounced visits to Young's Stables is not supported by the evidence and even if Respondent made unannounced visits, those visits would not have prevented the soring of Missy (Complainant's Appeal Pet. at 15-17).

The ALJ finds [n]otwithstanding the distance which existed from Respondent's place of work and residence and the location of Young's Stables, Respondent made unannounced visits and never found the horse to be in a sore condition, at which time her gait appeared to him to be free, flowing, and natural (Initial Decision and Order at 4).

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I disagree with Complainant's contention that the evidence does not support the ALJ's finding that Respondent made unannounced visits to Young's Stables. Respondent, who the ALJ found to be credible, testified that he checked Missy periodically while she was at Young's Stables and his visits to Young's Stables were generally unannounced visits Jr. 152-53). Moreover, Respondent testified that he never found Missy sore when he examined her at Young's Stables (Tr. 153). Therefore, I adopt with only minor modifications the ALJ's finding that Respondent made unannounced visits to Young's Stables and never found Missy in a sore condition.

However, I agree with Complainant's point that Respondent's examinations of Missy at Young's Stables would not have prevented soring. Complainant proved by a preponderance of the evidence that Missy was sore when entered at the 60th Annual Tennessee Walking Horse National Celebration, and Respondent concedes that Missy was sore when Ronal Young entered Missy in the 60th Annual Tennessee Walking Horse National Celebration. Therefore, I conclude that Respondent's examinations of Missy at Young's Stable did not prevent Missy from being sored.

Seventh, Complainant contends the ALJ erred in relying on Respondent's Exhibit B because it is unreliable. Complainant contends Respondent's Exhibit B is not reliable because the name of the horse referenced in Respondent's Exhibit B is Miss Ebony's Threat's Professor ; whereas, the name of the horse that is the subject of this proceeding is Ebony Threat's Ms. Professor. Moreover, Complainant states [i]t also appears that a date has been changed in paragraph 2 of the document. (Complainant's Appeal Pet. at 17-20.)

Appendix B

Respondent's Exhibit B is a one-page document entitled Affidavit of Ronal Young, which states, as follows:

AFFIDAVIT OF RONAL YOUNG

I RONAL YOUNG, being first duly sworn, testify as follows:

1. I reside at 2001 Highway 64W, Bedford County, Tennessee;

2. On or about the 25th day of August, 1998 I was the trainer of the horse known as Miss Ebony's Threat's Professor. Dr. Robert McCloy was the owner of said horse at that time;

3. When Dr. McCloy placed Miss Ebony's Threat's Professor in training with me, he specifically advised me to refrain from soring his horse or from doing any act which might make his horse in violation of the Horse Protection Act. I told him that I was well aware of and understood the meaning of the Horse Protection Act; and

4. Dr. McCloy did not in any way participate or assist in entering, transporting, preparing for show, or exhibiting the horse Miss Ebony's Threat's Professor on the date stated above.

FURTHER AFFIANT SAITH NOT.

/s/
RONAL YOUNG

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STATE OF TENNESSEE
CITY OF SHELBYVILLE

Sworn and subscribed before me, this *20th* day of December, 1999.

/s/
NOTARY

My commission expires: *Sept 9, 2002*

The record indicates an inordinate amount of confusion regarding the name of the horse which is the subject of this proceeding. Missy is variously referred to as Ebony Threat's Ms. Professor (Compl. ¶ 1), Ebony Threats Ms. Professor (CX 1 at 3, CX 2), E.T. Miss Professor (CX 3a), E.T. Miss Professor (CX 3b at 1, CX 3c at 1), Ebonys Threats Ms. Professor (CX 4 at 1), Ebonys Threats (CX 4 at 1), Ebony Threat's Miss Professor (CX 6 at 2), Ebonys Threats Miss Professor (Tr. 24), Ebony Threats Miss Professor (Tr. 37), Ebonys Threat Miss Professor (Tr. 47) ET Miss Professor (Tr. 135), ET's Miss Professor (Tr. 149-50), Missy (Tr. 169), and Miss Ebony's Threat's Professor (RX B). Despite this apparent confusion regarding Missy's name, the record clearly establishes each of these references is to Missy. I do not find witnesses or documents unreliable merely because they refer to Missy by a name other than Ebony Threat's Ms. Professor. Specifically, I do not find Ronal Young's written statement unreliable because he referred to Missy as Miss Ebony's Threat's Professor (RX B).

Moreover, I reject Complainant's contention that Ronal Young's written statement is unreliable because the date in the first sentence of paragraph 2 appears to be changed. The first sentence in paragraph 2 of Ronal Young's written statement states [o]n or about the 25th day of August, 1998 I was the trainer of the horse known as Miss Ebony's Threat's Professor. The last digit in the year appears to have been typed as a different number than 8 and the number 8 is clearly written in ink over the typed number. I do not find Ronal Young's written statement unreliable because of this change in the date in the first sentence of paragraph 2. The evidence clearly establishes that Ronal Young was Missy's trainer during the period from August 1997 to approximately February 1999. Therefore, the date, as changed, is consistent with other evidence in the record which establishes the period during which Ronal Young was Missy's trainer.

Eighth, Complainant contends the ALJ erroneously admitted Respondent's Exhibit C. Specifically, Complainant contends Respondent's Exhibit C is irrelevant because it does not mention Ronal Young or Missy and is silent on whether Respondent instructed Ronal Young not to sore Missy. (Complainant's Appeal Pet. at 20-21.)

Respondent's Exhibit C is a one-page letter from Tim Gray which states, as follows:

> To Whom It May Concern:
>
> I have known Dr. Bob McCloy of Norman, Oklahoma, since 1994. 1 have also trained horses for Dr. McCloy since the year beginning in 94.

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Dr. McCloy has always emphasized his strong desire for his Tennessee Walking Horses to be in compliance with the Horse Protection Act.

If you have any further questions, please feel free to contact me at any time. Thank you for your time.

Sincerely,

Tim Gray, WHTA Horse Trainer

TG:pg /s/

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[20] I find Respondent's

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20. *Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1012-13 (10th Cir. 1992) (stating relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); *United States v. Hollister*, 746 F.2d 420, 422 (8th Cir. 1984) (stating relevant evidence is evidence probative of a fact of consequence which has a tendency to make the existence of that fact more or less probable than it would have been without the evidence); *Carter v. Hewitt*, 617 F.2d 961, 966 (3d Cir. 1980) (stating evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence); *Grant v. Demskie*, 75 F. Supp. 2d 201, 218-19 (S.D.N.Y. 1999) (stating relevant evidence means evidence having any tendency to make the existence of any fact that is of

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Exhibit C is relevant because it corroborates Respondent's testimony that he instructed the trainers he hired not to sore his horses (Tr. 151, 162, 170-71). This pattern of conduct tends to support Respondent's evidence that he instructed Ronal Young not to sore Missy. I find Respondent's affirmative steps to prevent Ronal Young from soring Missy are relevant to the degree of Respondent's culpability for his violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). The degree of a respondent's culpability is one of the statutory criteria that must be considered when determining the amount of any civil penalty to be assessed for a violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824).[21]

Ninth, Complainant contends the ALJ erroneously refers to Respondent's Exhibit B and Respondent's Exhibit C as affidavits (Complainant's Appeal Pet. at 20).

The ALJ refers to Respondent's Exhibit B and Respondent's Exhibit C as affidavits (Initial Decision and Order at 5-6). An affidavit is a sworn statement in writing made under oath

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consequence to the determination of the action more probable or less probable than it would be without the evidence), *aff'd*, 234 F.3d 1262 (2d Cir. 2000) (Table); *Bowers v. Garfield*, 382 F. Supp. 503, 510 (E.D. Pa.) (stating relevant evidence is evidence that in some degree advances the inquiry and thus has probative value), *aff'd*, 503 F.2d 1398 (3d Cir. 1974) (Table); *Stauffer v. McCrory Stores Corp.*, 155 F. Supp. 710, 712 (W.D. Pa. 1957) (stating relevant evidence is evidence that in some degree advances the inquiry and thus has probative value).

21. *See* 15 U.S.C. § 1825(b)(1).

or on affirmation before a person having authority to administer the oath or affirmation.[22]

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22. *See e.g.*, Merriam Webster's Collegiate Dictionary 20 (10th ed. 1997):

> **affidavit** . . . *n* . . . a sworn statement in writing made esp. under oath or on affirmation before an authorized magistrate or officer.

The Oxford English Dictionary, vol. I, 216 (2d ed. 1991):

> **affidavit** .... A statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof.

Black's Law Dictionary 58 (7th ed. 1999):

> **Affidavit** . . . . A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.

Bouvier's Law Dictionary 158 (3d ed. 1914):

> **AFFIDAVIT.** A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation.

See also, e.g., Egger v. Phillips, 710 F.2d 292, 311 n.19 (7th Cir.) (stating a declaration that is not sworn before an officer authorized to administer oaths is, by definition, not an affidavit; the fact that a declarant recites that the statements are made under penalty of perjury does not transform an unsworn statement into an affidavit), *cert. denied*, 464 U.S. 918 (1983); *Robbins v. United States*, 345 F.2d

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930, 932 (9th Cir. 1965) (stating a statement that is not notarized, but contains a recital that is made under penalty of perjury is not an affidavit); *Williams v. Pierce County Bd. of Comm'rs*, 267 F.2d 866, 867 (9th Cir. 1959) (per curiam) (stating a document is not an affidavit if there is no certificate that the affiant took an oath or swore to his statement); *Amtorg Trading Corp. v. United States*, 71 F.2d 524, 530 (C.C.P.A. 1934) (citing with approval the definition of *affidavit* in Black's Law Dictionary (3d ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by oath or affirmation of the party making it, taken before an officer having authority to administer such oath); *Lamberti v. United States*, 22 F. Supp. 2d 60, 71 n.53 (S.D.N.Y. 1998) (stating an unsworn declaration not made under penalty of perjury nor stating the document is true is not an affidavit), *aff'd sub nom. Badalamenti v. United States*, 201 F.3d 430 (2d Cir. 1999) (Table); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 658 (N.D. Cal. 1994) (stating an affidavit must be confirmed by oath or affirmation); *Adkins v. Mid-America Growers*, 141 F.R.D. 466, 469 (N.D. Ill. 1992) (stating what separates affidavits from simple statements is the certification; the requirement is not trivial for it subjects the affiant to perjury penalties if falsely made); *Brady v. Blue Cross and Blue Shield of Texas, Inc.*, 767 F. Supp. 131, 135 (N.D. Tex. 1991) (stating an acknowledgment is not an affidavit because it contains no jurat); *Miller Studio, Inc. v. Pacific Import Co.*, 39 F.R.D. 62, 65 (S.D.N.Y. 1965) (holding a paper not sworn to is not an affidavit); *In re Central Stamping & Mfg. Co.*, 77 F. Supp. 331, 332 (E.D. Mich. 1948) (citing with approval the definition of *affidavit* in Bouvier's Law Dictionary: a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath or affirmation); *In re Johnston*, 220 F. 218, 220 (S.D. Cal. 1915) (stating the general definition of the term *affidavit* is a written declaration under oath; therefore, it has been held that, in order for an affidavit to be valid for any purpose, it must be sworn to); *Mitchell v. National*

(Cont'd)

Appendix B

Tim Gray's undated letter to To Whom It May Concern (RX C) is an unsworn statement which clearly does meet the definition of an affidavit. Therefore, I agree with Complainant that the ALJ's characterization of Respondent's Exhibit C as an affidavit, is error. The document entitled Affidavit of Ronal Young (RX B) is a written statement sworn and subscribed before a person identified as a notary public. Tennessee notaries public have the power to take affidavits; however, the notary public's seal must be affixed to any affidavit taken by a notary public.[23] The affixation of the notary's seal provides prima facie proof of a notary's official character, and, without the notary's seal, there is no proof that the person

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Surety Co., 206 F. 807, 811 (D. N.M. 1913) (stating it is a matter inherent in the affidavit that it must be under oath); *Crenshaw v. Miller*, 111 F. 450, 451 (M.D. Ala. 1901) (stating an affidavit is a voluntary, ex parte statement, formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it); *United States v. Glasener*, 81 F. 566, 568 (S.D. Cal. 1897) (stating the word *affidavit* is defined by Webster to be a sworn statement in writing); *In re Adams*, 229 B.R. 312, 315 (Bankr. S.D.N.Y. 1999) (citing with approval the definition of *affidavit* in Black's Law Dictionary (6th ed. 1990): a written . . . declaration or statement of facts . . . confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation); *Baldin v. Calumet National Bank (In re Baldin)*, 135 B.R. 586, 600 (Bankr. N.D. Ind. 1991) (citing with approval the definition of *affidavit* in Black's Law Dictionary (6th ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath or affirmation).

23. Tenn. Code Ann. § 8-16-302.

signing as a notary is a notary.[24] The notary public's seal is not affixed to Respondent's Exhibit B. Therefore, I conclude that there is not sufficient proof that the person before whom Ronal Young swore and subscribed Respondent's Exhibit B is a person having authority to administer Respondent's oath. I agree with Complainant that the ALJ's characterization of Respondent's Exhibit B as an affidavit, is error.

Tenth, Complainant contends the ALJ erroneously states that Complainant was required to prove that Respondent knew of his trainer's compliance records (Complainants Appeal Pet. at 25-28).

The ALJ states [o]n the record of this case, the Government completely failed to meet its burden to show that Dr. McCloy had knowledge of Mr. Young's or any other trainer's prior violations (Initial Decision and Order at 10). I agree with Complainant that the ALJ's statement is error. A horse owner's knowledge of prior violations of the Horse Protection Act by a trainer who the horse owner hires is not an element of a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, I have not adopted the ALJ's statement that Complainant failed to meet his burden to show that Respondent had knowledge of Ronal Young's or any other trainer's previous violations of the Horse Protection Act.

Eleventh, Complainant contends the ALJ erred by applying *Baird* to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C.

24. *In re Marsh*, 12 S.W.3d 449, 453 (Tenn. 2000).

§ 1824(2)(D)). Complainant contends the proper test to determine whether Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is the test in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995). (Complainant's Appeal Pet. at 28-43.)

The ALJ does not explicitly identify the test which she used to determine whether Respondent violated section 5 (2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). In any event, I agree with Complainant's point that *Baird* is inapposite. Respondent may obtain judicial review of this Decision and Order in the court of appeals of the United States for the circuit in which Respondent resides or has his place of business or the United States Court of Appeals for the District of Columbia Circuit.[25] Respondent does not reside in or have his place of business in the Sixth Circuit where *Baird* is applicable. Instead, the record establishes that Respondent resides in and has his place of business in Oklahoma (Compl. ¶ 1; Answer ¶ 1; RX D). Therefore, Respondent may obtain judicial review in the United States Court of Appeals for the Tenth Circuit or the United States Court of Appeals for the District of Columbia Circuit.

The United States Court of Appeals for the District of Columbia Circuit has rejected *Baird*.[26] Moreover, I am unable to locate any decision issued by the United States Court of Appeals for the Tenth Circuit which adopts *Baird* or even

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25. *See* 15 U.S.C. § 1825(b)(2), (c).

26. *See Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50-52 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995).

addresses the test to be used to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)). Therefore, *Baird* is not applicable to this proceeding. Instead, if Respondent obtains review in the United States Court of Appeals for the District of Columbia Circuit, the test to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995), is applicable. If Respondent obtains review in the United States Court of Appeals for the Tenth Circuit, the test used by the United States Department of Agriculture to determine whether a horse owner has violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) is applicable.

Twelfth, Complainant contends the ALJ erred by not disqualifying Respondent from showing, exhibiting, or entering any horse and from participating in any horse show, horse exhibition, horse sale, or horse auction (Complainant's Appeal Pet. at 43).

I agree with Complainant that the ALJ erred by not imposing a period of disqualification on Respondent, and I disqualify Respondent for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. My reasons for imposing the minimum disqualification period on Respondent are fully explicated in this Decision and Order, *supra*.

Appendix B

RESPONDENT'S APPEAL PETITION

Respondent raises one issue in Respondent's Petition for Appeal of Decision and Order and Answer to the Complainant's Petition for Appeal [hereinafter Respondent's Appeal Petition]. Respondent contends the ALJ erroneously based her conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) on Respondent's failure to remove Missy from Ronal Young's custody as soon as Respondent learned that Missy had been disqualified from being exhibited or shown at the 60th Annual Tennessee Walking Horse National Celebration (Respondent's Appeal Pet. at 3-5).

The ALJ based her conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) on Respondent's failure to remove Missy from Ronal Young's custody expeditiously after Missy was disqualified from being exhibited or shown at the 60th Annual Tennessee Walking Horse National Celebration, as follows:

> Once [Respondent] knew the horse's condition of having been sored, he did not immediately discharge or fire the trainer. By allowing the horse to remain with Mr. Young over a period of months, for boarding, training, and showing, Respondent was indirectly condoning what had previously occurred and possibly subjecting the horse to further abuse. Because of this, I conclude that Respondent violated section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

Initial Decision and Order at 13.

While I agree with the ALJ's conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), I agree with Respondent that the ALJ's basis for concluding that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), is error. Instead, I conclude Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) based on Respondent's breach of his guarantee as a horse owner that Ronal Young (a person who Respondent hired to board, train, and show Missy and a person allowed by Respondent to enter Missy in the 60th Annual Tennessee Walking Horse National Celebration) would not enter Missy in the 60th Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting Missy while she was sore.

COMPLAINANT'S EXHIBIT 7

A three-page article by Vickie Mazzola entitled *Everyone likes a silver dollar*, which was apparently copied from an internet website, is attached to the record transmitted to me by Hearing Clerk. This article is marked CX 7. I find nothing in the record indicating that Complainant's Exhibit 7 was received in evidence. Consequently, I do not find Complainant's Exhibit 7 part of the record, I do not consider Complainant's Exhibit 7, and Complainant's Exhibit 7 forms no part of the basis of this Decision and Order.

Complainant and Respondent have made numerous arguments, contentions, and objections. I have carefully considered the evidence and contentions of both parties.

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To the extent not adopted, they are found to be irrelevant, immaterial, or not legally sustainable. My decision is based on the record as a whole.

For the foregoing reasons, the following Order should be issued.

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ORDER

1. Respondent Robert B. McCloy, Jr., is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 30 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0020.

2. Respondent Robert B. McCloy, Jr., is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. Participating means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse

show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 30th day after service of this Order on Respondent.

3. Respondent Robert B. McCloy, Jr., has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.[27] The date of this Order is March 22, 2002.

Done at Washington, DC

March 22, 2002

William G. Jenson
Judicial Officer

27. *See* 15 U.S.C. § 1825(b)(2), (c).

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED AUGUST 10, 2001

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 99-0020

In re:

Robert B. McCloy, Jr.,

Respondent

Decision and Order

Preliminary Statement

This is an administrative disciplinary proceeding initiated by a Complaint filed May 4,1999, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, wherein it is alleged that the Respondent violated the Horse Protection Act as amended (15 U.S.C. §§ 1821 *et seq.*).

It is alleged in the Complaint that the Respondent, the owner of the horse known as "Ebony Threat's Ms. Professor" on September 4, 1998, allowed the entry of said horse as Entry No. 654 in Class 121 at the Sixtieth Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse

at that Show and that at such time the horse was sore. Said actions were alleged to be in violation of section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

The Respondent filed an Answer admitting that at all times material herein, he was the owner of the horse known as "Ebony Threat's Ms. Professor" but denied that he allowed the entry of "Ebony Threat's Ms. Professor" for the purpose of showing or exhibiting the horse while the horse was sore.

The sanction sought by Complainant is the assessment of a civil penalty of $2,200.00 and a disqualification of one year.

An oral hearing was held August 22, 2000, in Oklahoma City, Oklahoma, before Administrative Law Judge Dorothea A. Baker. Appearing on behalf of the Complainant was Colleen A. Carroll, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The Respondent appeared *pro se*.

In due course the parties filed briefs, the last brief having been filed July 5, 2001.

It is not disputed that the horse was sore at the time alleged. The Government presented evidence sufficient to raise the statutory presumption of soreness and proved by a preponderance of the evidence that the horse in question had met the legal definition of sore. The Respondent failed to present any evidence sufficient to rebut either the Government's *prima facie* case, or the statutory presumption, and in fact, conceded that the horse was sore.

Appendix C

The issue in this case is whether or not the Respondent "allowed" the entry of the horse while it was sore within the meaning of departmental and court decisions and thus violated the provisions of § 1824(2)(D) of the Act.

The resolution of this issue requires reference to the Government's interpretation of "allow" and the decisions of the Federal courts as reflected in *Crawford v. U.S. Dept. of Agriculture,* 50 F.3d 46 (D.C. Cir. 1995); *Baird v. U.S. Dept. of Agriculture*, 39 F.3d 131 (6th Cir. 1994) and *Burton v. U.S. Dept. of Agriculture*, 683 F.2d 280 (8th Cir. 1982). The instant case is appealable to the Tenth Circuit which has not yet had the opportunity to pass on what is meant and intended by the word "allow" as it pertains to an owner of a horse found to be sore.

I am imposing a sanction ($2,200.00) and no suspension for reasons more fully set forth herein.

Findings of Fact

1. The Respondent, Dr. Robert B. McCloy, Jr., has been a full-time Physician practicing for thirty-two years and is Director of Medical Services at the Norman Regional Hospital, in Norman, Oklahoma, where he was in charge of the Emergency Department for twenty-nine years. He was elected by his peers to serve as Chief-of-Staff at Norman Regional Hospital in 1992. In addition, Respondent has served his Community for many years, including a seat on the Board of Directors for the United Way for four years.

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2. "Ebony Threat's Ms. Professor" [Missy] was purchased by Respondent in January of 1995 and placed in training at the David Landrum Stables where she remained for approximately one year. Her trainer at the David Landrum Stables, Link Webb, left the Stables and took Missy with him. Because Mr. Webb was having trouble getting Missy to canter, he suggested that Respondent move Missy to Young's Stables, which Respondent did in August of 1997. At the time of the alleged violation the horse lived at Young's Barn in Lewisberg, Tennessee, and thus resided several States away from Respondent.

3. Missy had been shown by each of the trainers for a total of approximately twenty-five times and until the current alleged violation had always been found to be in compliance with the Act.

4. Respondent made clear to each trainer that he only purchased horses that walked "naturally," in other words they did not need to be sored. (Tr. 150).

5. On September 4,1998, "Ebony Threat's Ms. Professor's" trainer Ronal Young, entered the horse as Entry No. 654 in Class No. 121 at the Sixtieth Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse at the Show. The evidence is undisputed that the horse was found to be sore when she was entered in the Celebration. Respondent conceded that the horse was sore.

6. Respondent did not know Missy was at the Show or was to be exhibited. The first time he became aware that there were any plans to show Missy was when Mr. Young's wife, Judy, approached him in the stands at the Show and told him that Missy had been "turned down" during a pre-show inspection. Respondent was at the Celebration to see two of his other horses, i.e., Silver Dollar and A Shot of Gen, and was in attendance at the ten-day Show to see those two horses neither of which showed the same night as Missy. Upon being told the horse had not passed inspection, Respondent went to find Mr. Young and Missy but discovered they had both left the grounds. When Respondent confronted Mr. Young the next day, Mr. Young assured Respondent that what had happened did not involve Respondent and explained that the "ticket" was issued to Mr. Young and Respondent should not worry. Respondent was not aware for several months of the gravity of the situation until contacted by APHIS about the violation.

7. Notwithstanding the distance which existed from Respondent's place of work and residence and the location of Young's Stables, Respondent made unannounced visits and never found the horse to be in a sore condition, at which time her gait appeared to him to be free, flowing and natural. Respondent believed that he took any and all precautions that were necessary to prevent any abuse or violations of the Act.

8. Respondent made no attempt to determine whether Ronal Young had previously entered or exhibited a sore horse before employing him to board, train and show "Ebony

Threat's Ms. Professor." Respondent had previously employed Mr. Young to board, train and show another horse. Mr. Young had previously been cited V violating the Act, which information would have been available to Dr. McCloy from the Complainant. However, Respondent whose testimony is regarded as truthful indicated he did not know about Mr. Young's previous violation of the Act and that he was unaware of a way to have found that information or to have checked Mr. Young's record. Other than Dr. McCloy's admonition against cruel or illegal treatment of the animal, the training methods were those selected by Mr. Young. Respondent did not maintain control over the humane training methods, which he clearly expected Mr. Young to select and employ. Respondent continued to employ Mr. Young to board, train and show "Ebony Threat's Ms. Professor" even after Mr. Young presented the horse for inspection at the 1998 Celebration while she was sore.

9. Respondent, whose testimony is regarded as credible and truthful, testified that he affirmatively gave the trainer instructions regarding the non-abuse of his horses which included soring. He testified that he and Mr. Young had an oral agreement to which Mr. Young admitted in the form of a written Affidavit and in a sworn statement Mr. Young acknowledges that Dr. McCloy expressed a strong desire that Mr. Young refrain from soring practices. Another of Respondent's trainers, Tim Gray, also submitted a written statement which supports Respondent's testimony. Although the Complainant objected to the failure to have said persons at the hearing and therefore objected to the written Affidavits because the affiants were not subject to cross-examination, nevertheless that does not detract from the credibility of the

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Respondent's own testimony and such Affidavits are regarded as corroborative hearsay. If, after hearing the Respondent's own testimony, Complainant believed it to be incorrect, the Complainant could have subpoenaed both Mr. Young and Mr. Gray and could have questioned them about their respective Affidavits. Complainant did not do so. Both Mr. Young's and Mr. Gray's Affidavit statements were given to the Government prior to the hearing and neither affiant was subpoenaed. Therefore the Government was well aware that these were Affidavits upon which the Respondent would rely.

10. The Government did not bring a Complaint of violation against the trainer, Mr. Young. APHIS' unexplained but significant failure to prosecute Mr. Young in this case belies its contention that he was as abusive as the Government says he was: If the APHIS officials had knowledge that Mr. Young was Bering horses and/or was in violation of the Act, it would appear that the burden would be upon the Government to make this information known and to have lodged a Complaint against Mr. Young, the trainer.

11. The record fails to show that there was any affirmative duty on the Respondent to seek out what the Government knew (if he could get it) or to go to the Internet and seek what information may or may not have been on that facility at that particular time.

12. The trainer, Mr. Young, flatly disobeyed the Respondent's instructions not to sore the horse.

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13. Respondent did not immediately fire or terminate the relationship with Mr. Young. Instead he permitted the horse to remain in the custody of the trainer for another six months, thus subjecting the horse to possible further harm.

14. Except for the instant situation, none of Respondent's horses has ever been written up for any violation during Respondent's thirty-six year involvement with the Tennessee Walking Horse Industry.

Discussion and Conclusions

Congress found "the soring of horses is cruel and inhumane" and "horses shown or exhibited which are sore, where such soreness improves the performance . . . , compete unfairly with horses which are not sore" (15 U.S.C. § 18220)-(2)). Congress made it unlawful to: (1) show or exhibit a sore horse in any horse show or horse exhibition; (2) enter for the purpose of showing or exhibiting a sore horse in any horse show or horse exhibition; or (3) allow the showing of a sore horse in any horse show or horse exhibition. 15 U.S.C. § 1824(2)(A)-(B), (D). The term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, "physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)).

To prove a violation of 15 U.S.C. § 1824(2)(D), the Government has to establish by a preponderance of evidence that (1) the person charged is the owner of the horse in question; (2) the horse was shown, exhibited, or entered in a horse show or exhibition; (3) the horse was sore at the

time it was shown, exhibited, or entered; and (4) the owner allowed such showing, exhibition, or entry.

This is a case where the Government is seeking to hold the Respondent liable based solely on the theory of ownership and the strict liability standard.

A strong element entering into this matter is my finding that Respondent was a truthful, credible witness. His demeanor displayed honesty and integrity. His testimony has been awarded full credence and credibility.

The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)) and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-392 (1983). The standard of proof in an administrative proceeding conducted under the Horse Protection Act is preponderance of the evidence. In re: *Keith Becknell*, 54 Agric. Dec. 335 (1995).

Complainant's evidence, when considered in the light of Respondent's evidence, is not adequate to sustain Complainant's burden of proof except for the fact that Respondent did not take affirmative steps to expeditiously remove the horse from Mr. Young's custody as soon as Respondent learned that the horse had been written up at the pre-show inspection. It is reasonable to assume that some time may be required to find another trainer and a place to board the horse, but Respondent took six months after the Celebration, during which time he left the horse in harm's

way because the trainer, or someone under his direction and control, had previously sored it. This showed a disregard, or indifference to the horse's well being. The trainer previously had acted contrarily to Respondent's instructions not to sore the horse and as long as Respondent left the horse with Mr. Young, he assumed the risk that such trainer might do so again. In fact, Mr. Ronal Young's wife rode the horse in two later horse shows.

The Complainant seeks to show that Dr. McCloy cannot be believed. In furtherance of its theory that Dr. McCloy allowed the entry, the Government claims that his testimony is "self-serving, and not credible." It is surprising the Government would say this. As the Respondent, it was Dr. McCloy's obligation and duty to explain what occurred. To a prosecutor, an accused's defensive testimony will nearly always be self-serving. If Dr. McCloy was not convinced of his innocence, he could have saved the court's time and pled guilty. There has never been any legal principle that prevents "self-serving" testimony, or, that precludes such testimony as not credible when the finder of fact [frequently a jury] finds it to be credible.

Next, the Complainant points out that Dr. McCloy made no attempt whatsoever to determine whether Ronal Young had previously entered or exhibited a sore horse. Complainant did not show, as was its burden, that Respondent had any reason to suspect that Mr. Young would have violated the Act, or to have acted contrary to his instructions about not soring or abusing the horse. Although it would appear to be a good thing for an owner to do, there was no regulation at that time setting forth an affirmative duty by an owner to

investigate a trainer's background. The Government merely listed some case numbers where cases were instituted against Mr. Young.

APHIS' "Operating Plan" (RX 6) specifically indicates that consideration of a trainer's history will only apply to violations committed by a trainer on or after March 1, 1999. Moreover, the Respondent acted reasonably in hiring the trainer, Mr. Young. It is assumed that APHIS will develop and publish a uniform, fair and accurate description of a trainer's background, which will include where such data can be obtained.

Moreover, it is extremely significant that Mr. Young, the trainer, was not charged in this case. Indeed, failing to prosecute him can be considered a serious violation of the Government's heavy responsibility to impartially institute actions against all those it reasonably feels have violated the Act. This is a most telling aspect of the Government's position under this issue. The Government wholly failed to hold a man responsible that it expects the public to be well aware of. It defies logic to expect that Dr. McCloy should have known about Mr. Young because of his history when the Government decides Mr. Young's activities are not sufficient to warrant the filing of a Complaint in this case.

The Complainant seeks to show that Respondent employed other trainers with a history of violations. The Government alludes to numerous cases involving Billy Gray; however, only one resulted in a violation of the Act. Nevertheless, Dr. McCloy testified, without contradiction, that Billy Gray never trained any of his horses, rather

Billy Gray's son, Tim, did. And, the Government presented no evidence of any violations by Tim Gray. The Government also argued that Dr. McCloy employed Mr. David Landrum as a trainer. As Dr. McCloy testified, Mr. Link Webb, one of Mr. Landrum's assistants, trained Dr. McCloy's horses. Even so, the Government's brief stated that Mr. Landrum's cases resulted in a motion for preliminary injunction denied, and complaint dismissed. Surely, the Government cannot rely on these dispositions as support for its position.

In sum, the Government's contentions about Dr. McCloy's employment of trainers who have a "history" of Act violations is without support in the record. It stands to reason that only an attorney trained in the intricacies of administrative law would understand the terminology implemented by the Government. On the record of this case, the Government completely failed to meet its burden to show that Dr. McCloy had knowledge of Mr. Young's or any other trainer's prior violations. The Government failed to prove any violations other than one by Billy Gray, who undisputably never trained any of Dr. McCloy's horses.

APHIS developed a "Horse Protection Program" entitled "Operating Plan for the 1999 Horse Show Season." (RX 6). Among other things, there is set forth therein:

> D. *Limited Exemption from Liability.* Section 1824(2)(D) of the Act contains a limited exemption from liability for a horse owner who demonstrates that he or she did not "allow" the horse to be entered or exhibited in a show while sore. This exemption applies only to those owners

who themselves did not participate in the entry, exhibition, sale, or auction of a sore horse. An owner, to avoid liability for "allowing" his or her horse to be shown or exhibited, entered, sold, auctioned, or offered for sale while sore, must first present credible evidence that he or she did not participate in the entry, transportation, preparation for showing, exhibiting, sale, or auction. Second, the owner must show that he or she took affirmative steps: (1) to select a trainer whom the owner would not reasonably expect would sore the horse; (2) to ensure that the trainer understands what soring is as defined in the HPA, understands that the owner does not want the trainer to sore the horse and understands the consequences of soring the horse; and (3) to periodically check the condition of the horse. Examples of such affirmative action by an owner include without limitation the following:

1. *Written Instructions and Acknowledgment.* The owner has previously given the trainer written instructions not to sore the horse or to engage in practices or use devices that could be expected to result in soring, i.e., chains over the permitted weight, prohibited boots, collars, and rollers, caustic chemicals, overuse of permissible devices; and has informed the trainer in writing that failure to comply with the owners instructions will result in the trainer's immediate termination. The owner has obtained the trainer's written acknowledgment that he or she

understands and agrees to comply with such terms, and has read, understands and agrees to comply with the HPA and the Regulations.

2. *Consideration of Trainer's History.* The owner determines whether or not the trainer has previously violated the HPA. For example, if an owner hires a trainer whom the USDA, in a litigated HPA enforcement proceeding, has found to have violated the Act on or after March 1, 1999, then the hiring of such trainer by an owner means that the owner is aware that the trainer has previously exhibited, shown, entered, sold or transported a sore horse in violation of the HPA, and has accepted the risk that such trainer may do so again. Such an owner would have to present evidence to show that he or she acted reasonably in knowingly hiring that trainer.

3. *Unannounced Visits.* The owner or the owner's agent makes unannounced visits to the trainer's facility. The owner arranges for periodic unannounced inspections of the horse by a knowledgeable, independent licensed veterinarian (a veterinarian who is not otherwise employed by the trainer and who is competent to determine whether a horse is sore under the HPA).

It will be noted, among other things, from the data set forth by the Government that: "*For purposes of this Operating plan and this exemption. APHIS's consideration of a trainer's history will only apply to violations committed by a trainer on or after March 1, 1999.*"

Appendix C

The position of the Department is straight forward and unequivocal, i.e. An owner of a walking horse, is considered to be an "absolute guarantor" that the horse will not be entered or exhibited in a show while sore. An owner will therefore be held liable under the Act if a sore horse is entered or allowed to be entered in a show for purposes of being exhibited even if the owner is actually unaware that the horse was sore. As an "absolute guarantor" an owner is likewise held liable even if the owner instructed the trainer not to sore his horse. Entry (by the owner or by one acting for him) plus ownership and soreness are the only required elements for a violation. "Allowing" is made an ineluctable consequence of entry plus soring—if the horse is sore and is entered the owner has "allowed" the violation.

The D.C., Sixth and Eight Circuits have adopted a more lenient liability standard. *Baird v. U.S. Dept. of Agriculture, supra*; *Burton v. U.S. Dept. of Agriculture, supra*; *Cf. Crawford v. U.S. Dept. of Agriculture, supra.*

Each of these cases contains an enumeration of a set of relevant factors to consider, but which are not necessarily exhaustive. There is no hard and fast test to determine whether an owner has violated the provisions of § 1824(2)(D) of the Act. This is recognized by APHIS in its "Horse Protection Program—Operating Plan for the 1999 Horse Show Season." Lacking a fine line which can be drawn with distinction, I have carefully considered the contentions and arguments of the parties, and the legal precedents set forth in the cases referenced above.

Appendix C

The reliable record evidence herein shows that Respondent had exhibited horses in the past without committing any violations of the Act. He instructed the trainer Mr. Young not to sore the horse "Ebony Threat's Ms. Professor." The trainer disobeyed his instructions. On September 4, 1998, "Ebony Threat's Ms. Professor's" trainer, Mr. Ronal Young, entered her as Entry Number 654, in Class 121 at the Sixtieth Annual Tennessee Walking Horse National Celebration for the purpose of showing or exhibiting the horse at the Show. On pre-show examination the horse was found to be sore. Although he was present at the Show Respondent did not know that the horse had been entered in the Show and he did not know the horse was sore until he was told after the pre-show examination.

Once he knew the horse's condition of having been sored, he did not immediately discharge or fire the trainer. By allowing the horse to remain with Mr. Young over a period of months, for boarding, training, and showing, Respondent was indirectly condoning what had previously occurred and possibly subjecting the horse to further abuse. Because of this, I conclude that Respondent violated section 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)).

The Act provides:

> Any person who violates section 5 of this Act shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. [15 U.S.C. § 1825(b)(1). The maximum civil penalty has been increased from $2,000 to $2,200 for each violation, as authorized by the Federal

Appendix C

Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No.101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134). 28 U.S.C. § 2461; 7 C.F.R. § 3.91(b)(2)(vii) ("Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. § 1825(b)(1), has a maximum of $2,200."]

> In addition to any fine, imprisonment, or civil penalty authorized under this section any person . . . who paid a civil penalty assessed under subsection (b) . . . for any violation of any provision of this Act or any regulation issued under this Act may be disqualified by order of the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse-exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. . . . 15 U.S.C. § 1825(c).

The main purpose of the Horse Protection Act is to prevent the cruel, inhumane, and unfair practice of soring horses. In this case, and in view of all the circumstances, it would appear that disqualification is not necessary as a deterrent and that the imposition of a monetary penalty is sufficient to achieve the purposes of the Act.

In determining the appropriate civil penalty, the Secretary must consider the nature, circumstances, extent, and gravity of the prohibited conduct, the Respondent's degree of

culpability, history of prior offenses, ability to pay and the effect on Respondent's ability to continue business. All of these factors have been duly considered.

The Respondent is a practicing Physician and there is no indication of an inability to pay. He breeds horses as a hobby.

Therefore, in accordance with the Act, as amended, I am assessing a civil penalty of $2,200.

The parties hereto have made numerous arguments, contentions, and objections. I have carefully considered the evidence and contentions of both parties. To the extent not adopted, they are found to be irrelevant, immaterial, or not legally sustainable. My decision is based on the record as a whole.

Order

Respondent Robert B. McCloy, Jr., is assessed a civil penalty of $2,200.00.

This Decision and Order shall become final thirty-five (35) days after service hereof unless appealed to the Judicial Officer of the United States Department of Agriculture within thirty (30) days after receiving service hereof all as more fully set forth in the Rules of Practice and Procedure (7 C.F.R. §§ 1.130 *et seq.*, § 1.145).

Appendix C

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 10th day of August, 2001

s/ Dorothea A. Baker
Dorothea A. Baker
Administrative Law Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 3, 2004

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 02-9543

ROBERT B. MCCLOY, JR.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ORDER

Filed February 3, 2004

Before **KELLY**, **HENRY** and **HARTZ**, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix D

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ [illegible]
Deputy Clerk

Supreme Court, U.S.
FILED
AUG 27 2004
OFFICE OF THE CLERK

(2)

No. 03-1485

In the Supreme Court of the United States

ROBERT B. MCCLOY, JR., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Horse Protection Act, 15 U.S.C. 1821 *et seq.*, was enacted to prevent the practice of "soring" horses, by deliberately making their feet sore through the use of chemicals, burns, or lacerations, to alter their gait and enhance their performance in horse shows and exhibitions. The question presented in this case is:

Whether the United States Department of Agriculture reasonably found petitioner liable under the Horse Protection Act, 15 U.S.C. 1824(2)(D), for "allowing" the entering in a horse show of one of his horses that had been "sored."

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v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 351 F.3d 447. The decision and order of the Judicial Officer of the United States Department of Agriculture (USDA) (Pet. App. 15a-110a, 111a-112a) are unreported. The decision and order of USDA's administrative law judge (Pet. App. 113a-131a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2003. A petition for rehearing was denied on February 3, 2004 (Pet. App. 132a-133a). The petition for a writ of certiorari was filed on April 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Horse Protection Act (HPA or Act), 15 U.S.C. 1821 *et seq.*, to end the cruel practice of deliberately "soring" horses, usually Tennessee Walking Horses, for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, either by applying chemicals or by making cuts, burns, or lacerations, see 15 U.S.C. 1821(3), "the intense pain which the animal suffer[s] when placing his forefeet on the ground [will] cause him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking Horse. H.R. Rep. No. 1597, 91st Cong., 2d Sess. 2 (1970). Congress had three reasons for prohibiting that practice. First, soring inflicts great pain on the horse. Second, owners and trainers who sore their horses gain an unfair competitive advantage over those who rely on skill and patience. Third, by encouraging the breeding of horses who are champions as a result of soring rather than natural ability, the practice can ultimately damage the integrity of the breed. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4 (1976).

The HPA prohibits a number of practices with respect to "any horse which is sore." 15 U.S.C. 1824(2). As relevant here, it prohibits:

> The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity

> described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. 1824(2).

The incentives for horse owners to evade these prohibitions are powerful. Soring can artificially create a high-stepping gait in an otherwise mediocre horse, who then "competes unfairly with a properly and patiently trained sound horse with natural championship ability." H.R. Rep. No. 1174, *supra*, at 4. "Horses that attain championship status are exceptionally valuable as breeding stock," but "if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved," which will then drive down the value of properly bred and trained champions and only increase the incentives for soring. *Ibid.*

Thus, when Congress determined in 1976 that this cruel and destructive practice "continued on a widespread basis" despite the enactment of the HPA, H.R. Rep. No. 1174, *supra*, at 4-5, it strengthened the Act. Congress increased USDA's enforcement authority and resources, *id.* at 6-11, and it added a new sanction—disqualification—specifically meant to deter offenses by "individuals who have the economic means to pay civil penalties as a cost of doing business," *id.* at 11. The 1976 amendments made three further things clear. First, the government need not prove that the owner (or trainer) intended to make a horse sore for the purpose of affecting its gait. 15 U.S.C. 1821(3); H.R. Rep. No. 1174, *supra*, at 2; see *Thornton* v. *USDA*, 715 F.2d 1508, 1511-1512 (11th Cir. 1983). Second, the horse is presumed to be "sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. 1825(d)(5); H.R. Rep. No. 1174, *supra*, at 2. Third, proof of knowledge of the

soring is required for criminal, but not for civil, liability. Compare 15 U.S.C. 1825(a)(1) with 15 U.S.C. 1825(b)(1); see *Crawford* v. *USDA*, 50 F.3d 46, 48 & n.2 (D.C. Cir.), cert. denied, 516 U.S. 824 (1995).

The Act provides for both civil and criminal penalties for persons who engage in prohibited acts with regard to a horse that is sore. 15 U.S.C. 1825. Persons found in violation of the HPA are subject to civil penalties of up to $2000 for each violation, and may be disqualified from showing horses for a period of at least one year, increasing to five years for a subsequent violation. See 15 U.S.C. 1825(b)(1) and (c); 7 C.F.R. 3.91(b)(2)(vii) (adjusting civil penalties upward to $2200 in accordance with Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890). Persons who knowingly violate Section 1824 are subject to criminal penalties of up to one year of imprisonment and a $3000 fine for a first offense, and up to two years of imprisonment and a $5000 fine for subsequent criminal violations. See 15 U.S.C. 1825(a)(1) and (a)(2)(A). The Act authorizes the Secretary "to issue such rules and regulations as he deems necessary to carry out the provisions of [the Act]." 15 U.S.C. 1828.

2. In 1995, petitioner purchased a Tennessee Walking Horse named Ebony's Threat's Ms. Professor (Missy). Pet. App. 3a. Petitioner's first trainer had difficulty getting the horse to canter. *Id.* at 52a. Therefore, in 1997, petitioner placed Missy with Ronal Young, a trainer at a stable in Lewisburg, Tennessee, which was hundreds of miles from petitioner's residence and place of business. *Ibid.*[1] Petitioner testified that he

[1] Young previously had been cited for violating the HPA, although petitioner did not know of that citation and was unaware of how to check Young's record. Pet. App. 55a.

instructed Young not to sore the horse, observing that "[t]here was no need to sore the horse," *id.* at 87a-88a, and Young stated in an affidavit that petitioner had "advised [him] to refrain from soring his horse," *id.* at 97a; see *id.* at 99a-100a (letter from another trainer). But petitioner otherwise "did not maintain control over the training methods which he expected Ronal Young to select and employ when training Missy." *Id.* at 55a; see *id.* at 3a, 90a-91a. Petitioner made unannounced visits to Young's stables and never found Missy sored, *id.* at 54a-55a, but the USDA Judicial Officer found that petitioner's visits "would not have prevented soring," *id.* at 96a.

Missy was entered in the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on September 4, 1998. Pet. App. 3a, 53a. Two Designated Qualified Persons (DQPs) hired by the show inspected Missy and disqualified her from participating on the ground that she was sore. *Ibid.*[2] Two veterinarians from the Animal and Plant Health Inspection Service (APHIS), an agency of USDA, also examined Missy and determined that she was sore within the meaning of the HPA, 15 U.S.C. 1821(3). Pet. App. 3a, 53a-54a. Petitioner, who attended the show to watch two of his other horses, was not aware that Missy was at the show or was entered to be shown, and learned of Missy's disqualification while watching the show in the stands. *Id.* at 3a, 54a. When petitioner confronted Young the next day, Young did not deny responsibility. *Id.* at 54a, 117a. Petitioner nevertheless

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[2] Horse shows employ DQPs to inspect horses to ensure compliance with the Act and thereby to avoid liability under the Act for the show's managers. See 9 C.F.R. 11.7, 11.20; 15 U.S.C. 1823(c), 1824(3).

continued to employ Young to board, train and show Missy for approximately six more months after this soring incident. *Id.* at 56a. During those subsequent six months, Missy was shown twice, *id.* at 60a, and petitioner examined her himself both times, *id.* at 94a.

3. APHIS filed an administrative complaint on May 4, 1999, charging petitioner with violating the HPA, 15 U.S.C. 1824(2)(D), by allowing Missy to be entered in the Shelbyville show, where she was found to be sore. Pet. App. 4a. The administrative law judge (ALJ) found that petitioner had violated the Act and assessed a civil penalty in the amount of $2200. *Id.* at 113a-131a.

On administrative appeal, the Judicial Officer agreed with most of the ALJ's findings of fact, Pet. App. 17a, 52a-56a, and held that petitioner had violated the Act. The Judicial Officer accepted, as credible, petitioner's testimony that he had orally instructed Young not to sore the horse, and found that the instruction was not rendered less "genuine" by the fact that petitioner continued to leave the horse in Young's care after the soring incident. *Id.* at 91a, 93a. The Judicial Officer further found that the evidence established that although petitioner did not know in advance that Young had entered Missy in the Shelbyville show, petitioner did not object to his trainers, including Young, entering Missy in 25 previous shows and exhibitions, and petitioner did not contend that he did not allow Young to enter Missy in the Shelbyville show. *Id.* at 60a.

Under these circumstances, the Judicial Officer concluded that petitioner "cannot escape liability for a violation of [15 U.S.C. 1824(2)(D)] based on his credible testimony that * * * he did not have actual knowledge that Ronal Young would enter Missy in the show or based on his credible testimony that he instructed Ronal Young not to sore Missy." Pet. App. 61a. In so

concluding, the Judicial Officer found petitioner liable under the analysis approved by the D.C. Circuit in *Crawford*, 50 F.3d at 50-52, see Pet. App. 68a, as urged by APHIS on the administrative appeal, see *id.* at 106a. Under *Crawford*, a horse owner is liable for "allow-[ing]" entry of a sore horse if the owner permits such entry "by neglecting to restrain or prevent" it. *Id.* at 65a (quoting *Crawford*, 50 F.3d at 51 (quoting *Webster's Third New International Dictionary* 58 (1971))). Under that standard, an owner's "bare instruction" to his agents not to sore the horse, by itself, will not relieve the owner of statutory liability for allowing the horse to be entered or shown in a sore condition, even if the owner did not have actual knowledge of that action. *Id.* at 68a (quoting *Crawford*, 50 F.3d at 52).

The Judicial Officer accordingly affirmed the finding of a violation and the imposition of a $2200 fine. Pet. App. 17a, 109a, 111a. In addition, the Judicial Officer imposed the further sanction of a one-year period of disqualification "from showing, exhibiting, or entering any horse * * * and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction." *Id.* at 111a.

The Judicial Officer denied petitioner's request for reconsideration. See Order Denying Petition for Reconsideration, HPA Docket No. 99-0020 (June 20, 2002). In that denial, the Judicial Officer reiterated the applicability of the standard articulated in *Crawford*, noting that *Crawford* upheld as reasonable the USDA's position, which "merely holds the owner responsible for the actions of her agents (*particularly the trainer*) and will not permit the owner to escape liability by testifying that she instructed a *trainer* not to sore." *Id.* at 30 (quoting *Crawford*, 50 F.3d at 51) (emphasis added by Judicial Officer). The Judicial Officer also specifically

found that "Ronal Young served as [petitioner's] agent," because petitioner "authorized Ronal Young to act for and in place of [petitioner] with respect to the boarding, training, and showing of Missy." *Id.* at 30-31. The Judicial Officer subsequently stayed implementation of the order pending appeal. See Stay Order, HPA Docket No. 99-0020 (July 17, 2002).

4. The court of appeals affirmed. Pet. App. 1a-14a. The court noted that "the decisive question is *what* must the owner allow if he is to be liable" under 15 U.S.C. 1824(2)(D) for "allowing any activity described in [15 U.S.C. 1824(2)(A), (B) or (C)] respecting a horse which is sore." Pet. App. 6a. The court understood USDA's reading of the statute to require that "the owner need only allow the entry of the horse in a show, the sale of the horse, etc.," and "[t]he owner need have no knowledge of the horse's being sore, nor need the owner bear any fault with respect to the soring." *Ibid.* The court labeled this "the 'simply-allowing' interpretation." *Ibid.* The court also articulated what it believed to be the alternative reading of the statute: "that the owner must allow not just the entry of a horse, but the entry of a *sore* horse." *Ibid.* The court labeled this the "'allowing-plus' interpretation[]." *Id.* at 6a-7a. The court recognized that, within this interpretation, there were a variety of possible meanings of the "plus" factor, ranging from actual knowledge by the owner that the horse was sore to mere failure by the owner "to take reasonable steps to prevent the horse from being entered when sore." *Id.* at 6a.

Because "the USDA is charged with administering the HPA, and * * * it has consistently interpreted § 1824(2)(D) in the context of formal adjudication," the court concluded that USDA's construction of the statute is entitled to deference as long as it is reason-

able. *Id.* at 7a (citing *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002); *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 (2001); and *Crawford*, 50 F.3d at 50-52). The court of appeals then concluded that USDA's interpretation, as the court understood it, is supported by the text of the statute.

To reach that conclusion, the court focused on the phrase "respecting a horse which is sore" in clause (D). The court reasoned that if the "activity" "described in clause (A), (B), or (C)" that an owner is liable under clause (D) for "allowing" is the showing, entry, or sale of a *sore* horse, then the words "respecting a horse which is sore" in clause (D) would be rendered superfluous, because clauses (A), (B) and (C) themselves already include the language "any horse which is sore." Pet. App. 7a-10a. For that reason, the court concluded that the reference to "activity" in clause (D) could reasonably be interpreted to mean that "the owner must 'allow' * * * merely the showing or exhibiting of the horse." *Id.* at 9a-10a. The court, therefore, concluded that "the USDA could reasonably read the statute to say that if a sore horse is entered in a show, etc., the owner is liable simply for allowing it to be entered, regardless of whether the owner is implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring." *Id.* at 10a. Applying that test, the court upheld petitioner's liability after concluding that there was substantial evidence to support the Judicial Officer's finding that the trainer had authority from petitioner to enter Missy in the show. *Id.* at 11a-12a.

The court explained that, while "[i]n essence, it imposes on the owner a nondelegable duty not to engage in the practice of soring," that "may be justified as a prophylactic measure necessary to ensure that trainers

have no incentive to sore their horses." Pet. App. 11a (citing *Crawford*, 50 F.3d at 51-52). The court recognized, however, that "[o]f course, when an owner can convince the USDA of his or her efforts to prevent soring, the agency may decide to impose only a light sanction or none at all." *Ibid.* (citing 15 U.S.C. 1825(b)(1), which requires the Secretary, in determining the amount of civil penalties, to take into account "the nature, circumstances, extent, and gravity of the prohibited conduct," and the "degree of culpability" of the person found to have engaged in it).[3]

Judge Kelly dissented. Pet. App. 13a-14a. He took issue with the majority's focus upon the "respecting a horse which is sore" language in clause (D) and instead would have focused upon the meaning of the word "allow." *Id.* at 13a. He read the majority's opinion as rejecting an interpretation of clause (D) that would "require the USDA to prove that the owner is somehow responsible for the soring, either by authorizing, condoning, or remaining deliberately ignorant about it." *Ibid.* (citing *Lewis* v. *Secretary of Agriculture*, 73 F.3d 312, 315-316 (11th Cir. 1996); *Baird* v. *USDA*, 39 F.3d 131, 136 (6th Cir. 1994); and *Burton* v. *USDA*, 683 F.2d 280, 282-283 (8th Cir. 1982)). Judge Kelly would have defined "allow" as "'[t]o praise, commend, approve of,' or '[t]o admit the realization of, permit.'" *Id.* at 14a (quoting 1 *Oxford English Dictionary* 345 (2d ed. 1989)). Applying that definition, Judge Kelly would

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[3] See also 15 U.S.C. 1825(b)(4) ("The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection."). Only a person who has been assessed a civil penalty is subject to the additional sanction of suspension, and even then suspension is not required. 15 U.S.C. 1825(c).

have found petitioner not liable based on petitioner's non-pretextual instruction to his trainer not to sore Missy and petitioner's unannounced visits to check on the horse. *Ibid.*

The court of appeals denied a petition for rehearing or rehearing en banc, with no judge requesting a polling of the court on the question of en banc. Pet. App. 132a-133a.

ARGUMENT

The USDA Judicial Officer reasonably found petitioner liable under the HPA. Since the passage of the HPA more than 30 years ago, this is only the seventh case involving owner liability under Section 1824(2)(D) to reach a court of appeals on petition for direct review under the Act, see 15 U.S.C. 1825(b)(2). The court of appeals' decision in this case presents no issue warranting this Court's review.

1. a. Petitioner contends (Pet. 6-9) that the decision below endorses what he characterizes as USDA's "strict liability" interpretation of owner liability under 15 U.S.C. 1824(2)(D), an interpretation that has been rejected by other courts of appeals. *Ibid.* Petitioner's assertion regarding USDA's position is incorrect. USDA interprets Section 1824(2)(D) to impose liability under the standard approved by the D.C. Circuit in *Crawford*, which creates a strong, but rebuttable presumption, of owner responsibility. That is the standard applied by the Judicial Officer in this case, Pet. App. 63a-68a, and the one USDA argued to the court below. Gov't C.A. Br. 20-24 & n.8.

In *Crawford*, the D.C. Circuit interpreted the term "allowing" in Section 1824(2)(D) not to be "functionally equivalent to the imposition of absolute liability" whenever an owner allows the entry, show, or sale of a horse

that turns out to be sore. 50 F.3d at 51. Instead, the court explained, "[t]he Department merely holds the owner responsible for the actions of her agents (particularly the trainer) and will not permit the owner to escape liability by testifying that she instructed a trainer not to sore." *Ibid.* That interpretation reasonably conforms to a standard dictionary definition of "allow": "to permit by neglecting to restrain or prevent." *Id.* at 50-51 (citing *Webster's Third New International Dictionary* 58 (1971)). After all, as the D.C. Circuit observed, "Congress did not state that an owner is liable if she *authorizes* or *causes* a horse to be sored"—"[t]he word 'allow' is a good deal softer, more passive." *Id.* at 50.[4] Thus, even where an owner does not know the horse is sore, "if an owner enters or shows a sore horse, the Department assumes that he or she has not *prevented* someone in his or her employ from soring the horse." *Id.* at 51. "And, *by itself*, testimony that the owner 'instructed' the trainer not to sore the horse will not exculpate the owner. In so concluding, the Department merely takes into account the obvious proposition that the owner has the power to control his or her agents." *Ibid.*

Nevertheless, as the D.C. Circuit further explained in *Crawford*, an owner may be able to rebut the presumption of liability by, for example, showing "that a horse was sored by a stranger or someone not

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[4] The *Crawford* court noted that "allow" has a range of meanings (including "to make a possibility: provide opportunity or basis" or, more narrowly, "to intend or plan," *Webster's Third New International Dictionary*, *supra*, at 58), but it concluded that the interpretation chosen by USDA is not unreasonable, and is therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Crawford*, 50 F.3d at 50-51.

under the owner's control," or that the trainer "flatly disobey[ed]" the owner's instruction and was consequently fired, or other circumstances under which "it might well be that the Department could not conclude reasonably that the owner 'allowed' the entry of a sore horse." 50 F.3d at 51. But "an owner can and must do a good deal more than simply give the bare instruction to be thought to have 'prevented' her own horse from being entered in a sore condition." *Id.* at 52. That is so because such an instruction, "even were it deemed totally sincere, is not necessarily inconsistent with the proposition that the owner 'permitted'—for example, through neglect or lack of vigilance—the horse to be sored." *Id.* at 51-52.

Read in this way, the Act creates a presumption of owner responsibility that may be rebutted depending upon the weight of the evidence of the owner's efforts to prevent the soring. See *Crawford*, 50 F.3d at 52 (noting that relief from liability turns on "the weight the Department must give to evidence of the owner's instruction"). That approach is consistent with other presumptions established by the statute, such as the core presumption that a horse "shall be presumed to be a horse which is sore" in violation of the HPA "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. 1825(d)(5); see also H.R. Rep. No. 1174, *supra*, at 2 (noting elimination of "the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait"); *id.* at 9 (modifying criminal liability standard from a "willful" standard to one involving knowledge, so as not to require proof that "an individual actually engaged in an act which caused a horse to become sore").

USDA's Horse Protection Program Operating Plan (Operating Plan), discussed by petitioner (Pet. 10-12), is consistent with this interpretation. Since 1999 (the year following the violation at issue here), USDA has issued an Operating Plan setting out the terms under which a qualified Horse Industry Organization may undertake responsibility, in cooperation with APHIS, to enforce the HPA. See Pet. App. 124a-126a (setting forth relevant provisions of the 1999 Operating Plan); USDA, *Horse Protection Operating Plan* 25-26 (2004-2006) (setting forth same provisions under current Operating Plan) <http://www.aphis.usda.gov/ac/hpainfo.html>.[5] In the section addressing sanctions for violations, the Operating Plan states that 15 U.S.C. 1824(2)(D) "contains a limited exemption from liability for a horse owner who demonstrates that he or she did not 'allow' the horse to be entered or exhibited in a show while sore." See Pet. App. 124a. The Operating Plan explains that the exemption "applies only to those owners who themselves did not participate in the entry, exhibition, sale, or auction of a sore horse." *Id.* at 124a-125a. The Operating Plan then sets forth a non-exhaustive list of affirmative steps that an owner can take in an effort to avoid liability under the Act, including written instructions to, and written acknowledgment by, the trainer that the horse is not to be sored, and unannounced visits to the trainer's facility by the owner and by an independent, licensed veterinarian. See *id.* at 125a-126a.

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[5] "*Horse Industry Organization or Association* means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse." 9 C.F.R. 11.1.

The Operating Plan reflects USDA's interpretation of owner liability under 15 U.S.C. 1824(2)(D), as set forth in *Crawford* and maintained by USDA throughout this case. See Pet. App. 68a, 106a. USDA has consistently required a convincing showing that an owner took substantial steps beyond a bare oral instruction to the trainer not to sore a horse, or occasional unannounced visits. Cf. *Lewis* v. *Secretary of Agriculture*, 73 F.3d 312, 316 (11th Cir. 1996) (noting that the "Department urges this court to adopt the reasoning of * * * *Crawford*").

b. As the court of appeals in this case correctly recognized, see Pet. App. 7a, USDA's interpretation is entitled to deference. *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002). Like the D.C. Circuit in *Crawford*, the court of appeals found it appropriate for USDA to "be skeptical of self-serving testimony" about owners' instructions to trainers, and found it reasonable to place the burden on owners "as a prophylactic measure necessary to ensure that trainers have no incentive to sore their horses." Pet. App. 11a (citing *Crawford*, 50 F.3d at 51-52). The court of appeals appears to have misunderstood USDA's position, however, in further stating "USDA could reasonably read the statute" to impose owner liability "simply for allowing [the horse] to be entered, regardless of whether the owner is implicated in any way (by intent, negligence, or even failure to exercise greater control) in the soring." *Id.* at 10a. Even so, the court pointed out that "when an owner can convince the USDA of his or her efforts to prevent soring, the agency may decide to impose only a light sanction or none at all." *Id.* at 11a (citing 15 U.S.C. 1825(b)(1)). As explained above, USDA's position under *Crawford* is that it would not impose sanctions—indeed would not find a violation—if the owner made

the requisite showing of such efforts. In this case, the USDA Judicial Officer concluded that petitioner had not made the necessary showing under *Crawford*, Pet. App. 69a, and petitioner does not challenge that determination here.

Thus, although the court of appeals used a formulation not used by USDA, its ultimate conclusion was the same: USDA reasonably may impose liability on an owner for allowing the showing, entry, or sale of a horse that turns out to be sore, absent a convincing showing by the owner of sufficient affirmative efforts to prevent the soring. To the extent the court below may have articulated a stricter standard of liability than that applied by USDA in its administrative enforcement proceedings, that aspect of the court's opinion would not warrant review by this Court. USDA has responsibility for conducting administrative adjudications under the Act, and it will continue—in the Tenth Circuit and elsewhere—its longstanding policy of applying the standard set forth in *Crawford* and its own Operating Plan.

2. The decision below does not squarely conflict with the decisions of other courts of appeals construing the owner liability provision of the HPA. See *Burton* v. *USDA*, 683 F.2d 280, 282-283 (8th Cir. 1982); *Lewis*, 73 F.3d at 315-316; *Baird* v. *USDA*, 39 F.3d 131, 135-138 (6th Cir. 1994); see also *Stamper* v. *Secretary of Agriculture*, 722 F.2d 1483, 1487-1489 (9th Cir. 1984). While some of those decisions mischaracterize USDA's interpretation of the statute as imposing "strict" or "absolute" liability, see *Burton*, 683 F.2d at 282; *Lewis*, 73 F.3d at 315 (citing *Burton*); *Baird*, 39 F.3d 137 n.10; cf. *Crawford*, 50 F.3d at 51 (disagreeing with that mischaracterization), each holds—in accordance with USDA's position—that, to escape liability, an owner

must take meaningful affirmative steps to discharge his own responsibility to prevent soring.

Thus, to avoid liability for "allowing" the entry of a sore horse, the Eighth Circuit requires an owner to show not only that he had no knowledge that the horse was sore and that he instructed his trainer not to sore the horse, but also that a DQP "examined and approved the horse before entering the ring." *Burton*, 683 F.2d at 283. The Eleventh Circuit has articulated a similar approach, while emphasizing that the owner's efforts to prevent his trainer from soring the horse must be "meaningful rather than purely formal or ritualistic." *Lewis*, 73 F.3d at 317. The owner might satisfy this requirement by showing that he gave "firm and certain and suitably repeated directions not to sore and not to show a horse that is in sore condition"; that he "maintain[ed] a training environment that discourages soring or makes it impossible"; or that he "carr[ied] out inspection practices that tend to reveal any efforts to sore." *Ibid.* "But, whatever the form, his efforts must be meaningful and not a mere formalistic evasion." *Ibid.* See also *Stamper*, 722 F.2d at 1489 (assuming *Burton* test applies, failure to meet all three factors prevents an owner from escaping liability). Finally, the Sixth Circuit, which reads *Burton* as "enumerating a set of relevant factors to consider," *Baird*, 39 F.3d at 136-137, rather than "as constituting a hard-and-fast test," *id.* at 136, recognizes that an owner can be liable for indirectly "allowing" the showing of a sore horse—"*e.g.*, by failing to prevent such conduct or act," *id.* at 137. Thus, in the Sixth Circuit, an owner must "offer evidence that he took an affirmative step in an effort to

prevent the soring that occurred." *Ibid.*[6] In short, the courts of appeals—like USDA—recognize that whether an owner has unlawfully "allow[ed]" the showing of a sore horse is a highly contextual inquiry that turns on the facts of each case and the particular actions (and inactions) of the individual owner involved.

Petitioner's contention that he should not be held liable under the HPA also is not supported by the underlying fact patterns in the cases he cites. As petitioner appears to recognize (Pet. 8), petitioner cannot escape liability under the factors identified in *Burton* or *Lewis* because the DQPs who examined his horse for the show disqualified her. Pet. App. 53a. And in *Baird*, the owner did more than merely give his trainers an instruction not to sore: the court relied on his testimony that he "would take horses away from trainers he suspected of contravening his directive." 39 F.3d at 138; *Crawford*, 50 F.3d at 51 n.5 (noting that in *Baird* it "was at least shown that the owner had taken horses away from trainers engaged in soring"). Petitioner's actions here are more similar to those of the owner in *Crawford*, in which the D.C. Circuit affirmed USDA's

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[6] In *Baird*, the Sixth Circuit also articulated a burden-shifting approach, under which the government must refute, or prove pretextual, an owner's claims of affirmative steps to prevent soring. 39 F.3d at 137. This burden-shifting approach has not been followed by any other court of appeals. See *Lewis*, 73 F.3d at 316 ("[W]e can find no support in the Act for a burden-shifting test."); *Crawford*, 50 F.3d at 51-52. The Sixth Circuit has not had occasion to address these criticisms of *Baird* in the ten years since that case was decided, and it may decide to revisit its burden-shifting approach if the issue is presented to it again. In any event, this subsidiary issue of burden-shifting under a statutory scheme in which all courts agree that an owner must take meaningful affirmative steps to prevent the showing of a sored horse presents no issue warranting review by this Court.

finding of liability. There, although the owner—like petitioner—had instructed her trainer not to sore, the owner had paid the entry fee and intended to ride the horse in the show at issue. *Crawford*, 50 F.3d at 48. Here, although petitioner orally instructed his trainer not to sore Missy, he housed the horse with a trainer hundreds of miles from his home and place of business, Pet. App. 52a, otherwise provided no instructions as to her training, *id.* at 55a, and permitted the trainer to enter the horse in shows without his prior knowledge or oversight, including the show at issue, *id.* at 60a. The only step petitioner took in addition to his bare oral instruction not to sore—his unannounced visits to Missy—the Judicial Officer found as fact were not enough to prevent soring. *Id.* at 96a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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